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Number:

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

RECORD DATA, INC., a corporation, PETITIONER
vs.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (JACK F. NEAL, et als, REAL PARTIES IN INTEREST) RESPONDENTS
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner

Number:

IN THE SUPREME COURT OF
THE UNITED STATES

October Term 1983

IN re: RECORD DATA, INC., a corporation,

Petitioner

On Writ of Certiorari to the
United States Court of
Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

The questions presented to the Court for review are:

Ultimate Questions

1. Did the United States Court of Appeals for the Eleventh Circuit err in ruling in its June 30, 1983 Order that:

> Concluding that the Court of Appeals has no jurisdiction to review the remand by mandamus or otherwise, the petition for mandamus and/or prohibition is denied. See 28 U.S.C. §1447(d),

and thus ruling that it had no jurisdiction to review the April 13, 1983 Order of the United States District Court for the Northern District of Alabama which remanded the action to the state court on the ground that the "action was removed improvidently and without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith" when said Memorandum of Decision stated unequivocally that "it is clear that this court would have original jurisdiction over this action, see 29 U.S.C. §216(b)" and that

"Defendant [Petitioner] timely petitioned this court for removal of the action to the Northern District of Alabama, Northeastern Division"?

2. Did the United States Court of Appeals for the Eleventh Circuit err in ruling in its June 30, 1983 Order that:

> Concluding that the Court of Appeals has no jurisdiction to review the remand by mandamus or otherwise, the petition for mandamus and/or prohibition is denied. See 28 U.S.C. &1447(d),

and thus ruling that it had no jurisdiction to review the April 13, 1983 Order of the United States District Court for the Northern District of Alabama which remanded the action to the state court when the remand order of the District Court involved the resolution of an important, unsettled and novel question of federal law, i.e. whether a suit under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §§201, et. seq., originally filed in a state court having jurisdiction thereof, is removable to a United States District Court under the

federal removal statutes, as amended, 28 U.S.C.A. §§1441 et. seq.?

Subsidiary Question

1. Whether a suit under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. §§201 et. seq., originally filed in a state court having jurisdiction thereof, is removable to a United States District Court under the federal removal statutes, as amended, 28 U.S.C.A. §§1441 et. seq.?

PARTIES TO THE ACTION IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

1. E. B. Haltom, Jr.	Respondent herein and in the Court of Appeals; Trial Judge in the District Court.
2. Jack F. Neal	Respondent herein and in the Court of Appeals; Plaintiff in the District Court and in the State Court.
3. Record Data, Inc., a corporation	Petitioner herein and in the Court of Appeals; Defendant in the District Court and in the State Court.

4.	Record Data of Alabama, Inc.	Co-Defendant in the District Court added by Plaintiff after removal.

DESIGNATION OF CORPORATE RELATIONSHIPS

Record Data, Inc., a corporation, who files this Petition for Writ of Certiorari in this proceeding, states that:

1. This is its original designation of corporation relationships.

2. Record Data, Inc., a corporation, that is privately held principally by Bruce B. Felder and Leonard R. Stein-Sapir, and is not owned by any parent corporation.

3. Record Data, Inc., a corporation, does not have any ownership interest in any subsidiaries except those which are wholly owned subsidiaries.

4. Record Data, Inc., a corporation, does not have an ownership interest in any other subsidiaries, except in wholly-owned subsidiaries.

5. Record Data, Inc., a corporation, does not have any affiliates.

Dated this the 24th day of September, 1983.

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TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

		Page
1.	Questions presented for review.....	i
2.	Parties to the action in the United States Court of Appeals for the Eleventh Circuit....	iii
3.	Designation of Corporate Relationships.	iv
4.	Table of Contents and Authorities.....	vi
	A. Table of Contents....	vi
	B. Table of Authorities.	vi
5.	Official and unofficial reports of opinions delivered in the courts below.....	2
6.	Statement of grounds on which the jurisdiction of the Court is invoked.	2
7.	Statutes which the case involves.....	2
8.	Statement of the case...	6
9.	Arguments for allowance for the Writ.....	14
10.	Appendix.....	A-1

B. Table of Authorities

Cases	Page
Aaker v. Kaiser Co., Inc., 74 F. Supp. 55 (D. Ore. (1947).	43
Anthony v. West Coast Drug Co., 331 F. Supp. 1279 (W. D. Wash. 1971).	47
Asher v. William L. Crow Construction Co., 118 F. Supp. 495 (S.D.N.Y. 1953).	48
Baldwin v. Sears, Roebuck & Co., 667 F. 2d 458 (5th Cir. 1982).	54
Barrett v. McDonald's of Oklahoma City, 419 F. Supp. 792 (W. D. Okla. 1976)	29,38,47
Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir. 1981).	20,50
Brennan v. Arnheim and Neely, Inc., 410 U.S. 512, 35 L. Ed. 2d 463, 93 S. Ct. 1138 (1973).	28
Buckles v. Morristown Kayo Co., 132 F. Supp. 555 (E. D. Tenn. 1955).	47,49
Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392 (1881).	25
Butner v. United States, 440 U. S. 48, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979).	28

Page

Carter v. Hill and Hill Truck Lines, Inc., ... 29,38
259 F. Supp. 429
(S.D. Tex. 1966).

In re Cement Antitrust Litigation,. 32
688 F. 2d 129
(9th Cir. 1982)

Colin K. v. Schmidt, ... 55
528 F. Supp. 355
(D.R.I. 1981).

Colonial Times, Inc. v. Gasch, ... 33
509 F. 2d 517
(D.C. Cir. 1975).

Commissioner of Internal Revenue v. Bosch, ... 28
387 U.S. 456, 18 L. Ed. 2d 886,
87 S. Ct. 1776 (1967).

Cox v. Gatliff Coal Co., ... 42,43
52 F. Supp. 482
(E. D. Ky. 1943).

Glidden v. Zdanok, ... 34
370 U.S. 530, 8 L. Ed. 2d 671,
82 S. Ct. 1459 (1962).

Goettel v. Glenn Berry Mfrs., Inc., 47,48
236 F. Supp. 884
(N.D. Okla. 1964).

Gordon v. United States Fire Ins. Co., ... 26
531 F. 2d 257
(5th Cir. 1976).

Gottlieb v. Firestone Steel Products Co., ... 25
524 F. Supp. 1137
(E.D. Pa. 1981).

Green v. Fluor Corp., ... 48
122 F. Supp. 224
(S.D.N.Y. 1954).

Page

In re Halkin, ... 25
598 F. 2d 176
(D. C. Cir. 1979).

Hamilton v. Morial, ... 33
644 F. 2d 351
(5th Cir. Unit A 1981).

Harris v. Reno Oil Co., ... 41,42
48 F. Supp. 908
(N.D Tex. 1943).

Haun v. Retail Credit Company, ... 55
420 F. Supp. 859
(W. D. Pa. 1976).

Herrera v. Payne, ... 33
673 F. 2d 307
(10th Cir. 1982).

Hill v. Moss American, Inc., .29,38,47,48,49,50,
309 F. Supp. 1175 51
(N.D. Miss., 1970).

Jacobi v. High Point Label, Inc., .55
442 F. Supp. 518
(N.D.N.C. 1977).

Korell v. Bymart, Inc., ...48,49
101 F. Supp. 185
(E.D.N.Y. 1951).

La Buy v. Howes Leather Company, ..32
352 U.S. 249, 1 L. Ed. 2d 290,
77 S. Ct. 309 (1957).

London v. United States Fire
Ins. Co., ...22
531 F. 2d 257
(5th Cir. 1979).

Page

McClellan v. Carland, ...25
217 U.S. 268, 54 L. Ed. 762,
30 S. Ct. 501 (1910).

McConnell v. Marine Engineers
Beneficial Ass'n., ...55
528 F. Supp. 770
(N. D. Cal. 1981).

McGarrigle v. 11 West Forty-Second
Street Corp., ...41
48 F. Supp. 710
(S.D.N.Y. 1942).

Merrill, Lynch, Pierce, Fenner &
Smith, Inc. v. Haydu, ...18,26
637 F. 2d 391
(5th Cir. Unit B 1981).

In re Merrimack Mutual Fire
Ins. Co., ... 18,20,25,26
587 F. 2d 642
(5th Cir. 1978).

Mid-Continent Pipe Line Co.
v. Hargrave, ...43,44
129 F. 2d 655
(10th Cir. 1942).

Milliken v. Bradley, ... 34
418 U.S. 167, 5 L. Ed. 2d 1069,
94 S. Ct. 3112 (1974).

Monroe v. Pape, ...27
365 U.S. 167, 5 L. Ed. 2d 492,
81 S. Ct. 473 (1961).

Page

National Right to Work Legal Defense and Educational Foundation, Inc. v. Richey, ... 33
510 F. 2d 1239
(D. C. Cir. 1975).

New York City Transit Authority v. Beazer, ... 27
440 U.S. 568, 59 L. Ed. 2d
589, 99 S. Ct. 1355 (1979).

Nieves v. Deshler, ... 29,38,47
561 F. Supp. 1173 (D.P.R. 1983)

Niswander v. Paul Hardeman, Inc.,47,49
223, F. Supp. 74
(E. D. Ark. 1963).

Owens v. Greenville News-Piedmont, ...41,42,43
43 F. Supp. 785
(W.D.S.C. 1942).

Ex parte Parker, ...25
120 U.S. 737, 30 L. Ed. 818,
7 S. Ct. 767 (1887).

Ex parte Republic of Peru, ...24
318 U.S. 578, 89 L. Ed. 1014,
63 S. Ct. 793 (1943).

Ricciardi v. Lazzara Baking Corp., ...43
32 F. Supp. 956
(D.N.J. 1940).

Roche v. Evaporated Milk Association, ...24,25
319 U.S. 21, 87 L. Ed. 1185,
63 S. Ct. 938 (1943).

Page

Rossi v. Singer Sewing Machine Co., ... 48,49,50
127 F. Supp. 53
(D. Conn. 1954).

Royal v. State Farm Fire and Casualty Co., ... 22,26
685 F. 2d 124
(5th Cir. 1982).

Ryan v. State Board of Elections, . 18,20
661 F. 2d 1130
(7th Cir. 1981).

Schlagenhauf v. Holder, ... 31
379 U.S. 104, 13 L. Ed. 2d 152,
85 S. Ct. 234 (1964).

Shaw v. Munford, ... 25
526 F. Supp. 1209
(S.D.N.Y. 1981).

Sheet Metal Workers International Association, AFL-CIO v. Seay, ... 18,20, 23
693 F. 2d 1000
(10th Cir. 1982)

In re Shell Oil Co., ... 18,26
631 F. 2d 1156
(5th Cir. Unit. A 1980).

Sheridan v. Leitner, ... 42
44 N.Y.S. 2d 570
(City Court of N.Y. 1943).

Sicinski v. Reliance Funding Corp., ... 55
461 F. Supp. 649
(S.D.N.Y. 1978).

Sonnesyn v. Federal Cartridge Co., 41,42,43
54 F. Supp. 29
(D. Minn. 1944).

Page

In re Southwestern Bell Telephone Co., ... 26
535 F. 2d 859
(5th Cir. 1976).

Swettman v. Remington Rand, Inc., .. 40,42
65 F. Supp. 940
(S.D. Ill. 1946).

Taylor v. Brown, ... 29,38,47
461 F. Supp. 559
(E.D. Tenn. 1978).

Thermtron Products, Inc. v. Hermansdorfer, ... 15,16,17,18
423 U.S. 336, 46 L. Ed. 2d 542, 23,26,39,
96 S. Ct. 584 (1976). 56

United States v. Christian, ... 25
660 F. 2d 892
(3rd. Cir. 1981).

United States v. Hughes, ... 33
413 F. 2d 1244
(5th Cir. 1969).

United States v. Nixon, ... 34
418 U.S. 683, 41 L. Ed. 2d 1039,
94 S. Ct. 3090 (1974).

Vermont Yankee Nuclear Corp. v. National Resources Defense Council, Inc., ... 27
435 U.S. 519, 55 L. Ed. 2d 460,
98 S. Ct. 1197 (1978).

In re Vuitton et Fils, S.A., ... 33
606 F. 2d 1
(2nd Cir. 1979).

Wilk v. American Medical Association, 33
635 F. 2d 1295
(7th Cir. 1981).

Page

Wilkins v. Renault Southwest, Inc., ... 20,38
227 F. Supp. 647
(N.D. Tex. 1964)

Will v. United States, ... 24,32
389 U.S. 90, 19 L. Ed. 2d 305,
88 S. Ct. 269 (1967).

Zorilla v. Puerto Rican Cement Co., ... 30,39
227 F. Supp. 159
(D.P.R. 1964).

Statutory Provisions

15 U.S.C.A. §77(v)(a)..... 53

28 U.S.C.A. §71..... 45

28 U.S.C.A. §1254(1)..... 2

28 U.S.C.A. §1331.....9,12,14,22

28 U.S.C.A. §1332.....9,12,14,22

28 U.S.C.A. §1337.....9,12,14,22

28 U.S.C.A. §§1441 et seq..... iii

28 U.S.C.A. §1441..... 9,37

28 U.S.C.A. §1441(a).....2,30,41,46

28 U.S.C.A. §1445(a).....53

28 U.S.C.A. §1445(b).....53

28 U.S.C.A. §1445(c).....53

28 U.S.C.A. §1446.....9

Page

28 U.S.C.A. §1447(c).....3,11,15,19,25, 26,39

28 U.S.C.A. §1447(d).....3, 15

29 U.S.C.A. §§201 et seq.....7

29 U.S.C.A. §216(b).....3,8,9,11,12, 14,22,36

29 U.S.C.A. §§621 et seq.....54

46 U.S.C.A. §688.....53

Rule 17.1(a), United States Supreme Court Rules.....28

Rule 17.1(c), United States Supreme Court Rules.....27,34

Rule 28.2, United States Supreme Court Rules.....58

Rule 28.3, United States Supreme Court Rules.....58

Rule 28.5(b), United States Supreme Court Rules.....58

Textbooks and Other Authorities

32A Am. Jur. 2d Federal Practice and Procedure, §963 (1982). 33

32B Am. Jur. 2d Federal Practice and Procedure, §2552 at 284 (1982). 15

Annot., 10 ALR Fed. 919 (1972)...30, 39

1A Moore's Federal Practice.....45 ¶0.167[5] (2d rev. ed. 1983)

	Page
1A Moore's Federal Practice ..... ¶0.169 [2.-1] at 694 (2d rev. 2d 1983)	24
14 C. Wright and A. Miller, ... Federal Practice and Procedure, §3729 (1976)	45
16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §3932 (1977).	25
16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §3933 (1977).	24
16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §3934 (1977).	33
16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §4004 (1977).	35

Number:

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

IN re: RECORD DATA, INC.,
a corporation,

Petitioner.

On Writ of Certiorari to the
United States Court of
Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered June 30, 1983 on that certain Petition for Writ of Mandamus and Other Relief in said court styled "In re: Record Data, Inc., a corporation, Petitioner, Civil Action Number 83-7320" in which said judgment the United States Court of Appeals for the Eleventh Circuit ruled

that it had no jurisdiction by which to review the judgment of the United States District Court for the Northern District of Alabama, Northeastern Division, entered on April 13, 1983 remanding the action to the Circuit Court for Madison County, Alabama.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinions of the United States District Court for the Northern District of Alabama, Northeastern Division, and the United States Court of Appeals for the Eleventh Circuit in this case were not reported, either officially or unofficially.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

Jurisdiction of this Petition for Writ of Certiorari is conferred upon the United States Supreme Court by section 1254(1) of Title 28 of the United States Code Annotated.

STATUTES WHICH THE CASE INVOLVES

28 U.S.C.A. §1441(a)

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C.A. §1447(c).

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C.A. §1447(d).

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

29 U.S.C.A. §216(b).

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their un-

paid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment

of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case presents to the Court a petition for writ of certiorari whereby Petitioner Record Data, Inc., a corporation requests that the Court issue a writ of certiorari directed to the United States Court of Appeals for the Eleventh Circuit directing the Court of Appeals to (1) vacate its June 30, 1983 Order wherein it ruled that it had no jurisdiction to review the April 13, 1983 Order of the United States District Court for the Northern District of Alabama which remanded this action to the Circuit Court for Madison County, Alabama, (2) order the United States District Court for the Northern District of Alabama to vacate its April 13, 1983 Order and accompanying Memorandum of Decision remanding the action from said court to the Circuit Court for Madison County, Alabama, (3) order the United States District Court for the Northern District of Alabama to enter an order ruling

that the action was providently and properly removed under original jurisdiction to the United States District Court for the Northern District of Alabama from the Circuit Court for Madison County, Alabama, and (4) order the United States District Court for the Northern District of Alabama to proceed to the trial of the action.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

On April 15, 1982, Jack F. Neal [hereinafter referred to as "Neal"], filed a summons and complaint against Record Data, Inc., a corporation, [hereinafter referred to as "Petitioner"] in the Circuit Court for Madison County, Alabama [hereinafter referred to as the "State Court"], Civil Action Number CV 82-317B [hereinafter referred to as "the action"] seeking damages for alleged unpaid overtime compensation under the Fair Labor Standards Act, as amended, 29 U.S.C.A. sections 201 et. seq., [hereinafter referred to as the "FLSA"].

On May 7, 1982, Petitioner, as the sole

defendant in the action at that time, removed the action from the state court to the United States District Court for the Northern District of Alabama, Northeastern Division [hereinafter referred to as the "District Court"], by filing with the clerk of the District Court and serving upon counsel for Neal: (1) a verified petition for removal; (2) a bond for removal with good and sufficient surety; (3) the required filing fee; and (4) a verification of having given counsel for Neal written notice of said removal and having filed a copy of said petition for removal with the state court; and by filing with the clerk of the state court and serving upon counsel for Neal (1) a notice of filing of petition for removal and (2) a copy of said petition and bond for removal.

On July 16, 1982, Neal filed with the clerk of the District Court a motion to remand, requesting that the District Court remand the action to the state court on the grounds that (1) pursuant to section 216(b)

of Title 29 of the United States Code, FLSA suits "may be maintained in any court of competent jurisdiction" and the action thus was not removable and (2) that there was not complete diversity of citizenship between the litigants.

On August 3, 1982, Petitioner filed its response to Neal's motion to remand, wherein Petitioner alleged that the action was properly removed to the District Court pursuant to sections 1441 and 1446 of Title 28 of the United States Code Annotated upon four separate bases of original jurisdiction: sections 1331, 1332 and 1337 of Title 28 of the United States Code Annotated and section 216(b) of Title 29 of the United States Code Annotated.

On April 13, 1983, the Honorable E. B. Haltom, Jr., District Judge in the District Court [hereinafter referred to as "Judge Haltom"], entered an order remanding the action to the state court on the ground that the "action was removed improvidently and

without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith". [emphasis added] (Appendix at 2).

On April 13, 1983, Judge Haltom issued a Memorandum of Decision in support of his April 13, 1983 remand order, wherein he relied on two unpublished orders previously issued by other judges in the Northern District of Alabama in ruling that:

> Conceding that there is meritorious argument to be made for removal of FLSA cases, this member of the court declines to depart from the precedent of the United States District Court for the Northern District of Alabama enumerated above until such time as a definitive ruling is made either by the United States Court of Appeals for the Eleventh Circuit or by the Supreme Court of the United States. Consequently, the court holds that, this action having been commenced in the state circuit court, it was improvidently removed to this court, and must be remanded. In so holding, the court concurs with the decisions of Price and Goldkist, supra. (Emphasis added).

(Appendix at 9).

In so ruling, Judge Haltom made the following critical observations: "[I]t is clear that this court would have original jurisdiction over this action, see 29 U.S.C. §216(b)" and "Defendant [Petitioner] timely petitioned this court for removal of the action to the Northern District of Alabama, Northeastern Division." (Appendix at 4). (emphasis added).

On April 25, 1983, Petitioner filed a motion for reconsideration with the District Court, wherein it requested alternatively that Judge Haltom either (1) "reconsider and overrule his April 13, 1983 order remanding [the] action to the Circuit Court for Madison County, Alabama" or (2) "revise [said] Order to state that his decision was based solely upon ...unpublished orders [of the Northern District of Alabama] and not upon section 1447(c) of Title 28 of the United States Code and that if th[e] action had been commenced originally in the [District] [C]ourt, th[e] [District C]ourt

would have jurisdiction of th[e] action pursuant to sections 1331, 1332 and 1337 of Title 28 of the United States Code, and section 216(b) of Title 29 of the United States Code, and that [Petitioner] complied with all the procedural and statutory requirements in removing th[e] action to the [District C]ourt." On May 4, 1983, Judge Haltom denied, without comment, Petitioner's motion for reconsideration and/or revision of his April 13, 1983 remand order and memorandum of decision.

On June 3, 1983, Petitioner filed with the United States Court of Appeals for the Eleventh Circuit [hereinafter referred to as the "Court of Appeals"] a Petition for Writ of Mandamus and Other Relief wherein it requested that the Court of Appeals "issue a Peremptory, Advisory and Supervisory Writ of Mandamus directed to [Judge] Haltom, directing him to (1) vacate his April 13, 1983 Order, and accompanying Memorandum of Decision . . .; (2) enter an Order ruling

that the action was providently and properly removed under original jurisdiction to [the District C]ourt from the [State Court]; and (3) proceed to the trial of the action." Petitioner also requested that pending the Court of Appeals' ruling, that the Court of Appeals issue an order to the state court staying any further proceedings in the action in the state court.

On June 6, 1983, the Court of Appeals issued an order taking Petitioner's Petition for Writ of Mandamus and Other Relief under advisement, directing Petitioner and Respondent to submit briefs in support of their positions, and further enjoining any of the parties from proceeding in the state court until otherwise ordered. (Appendix at 14). On June 27, 1983, the Court of Appeals heard oral arguments on Petitioner's Petition for Writ of Mandamus and Other Relief.

On June 30, 1983 the Court of Appeals issued an order denying Petitioner's Petition for Writ of Mandamus and Other Relief:

> Concluding that the Court of Appeals has no jurisdiction to review the remand by mandamus or otherwise, the petition for mandamus and/or prohibition is denied. See 28 U.S.C. §1447(d).
>
> The injunction, heretofore granted, from proceeding in state court is dissolved.

(Appendix at 16).

The District Court had jurisdiction of Petitioner's removal papers on four separate bases of federal jurisdiction: (1) 28 U.S.C.A. §1331 (federal question jurisdiction); (2) 28 U.S.C.A. §1332 (diversity of citizenship jurisdiction); (3) 28 U.S.C.A. §1337 (regulation of commerce jurisdiction); and (4) 29 U.S.C.A. §216(b) (FLSA jurisdiction).

ARGUMENTS FOR ALLOWANCE OF THE WRIT

1. IN DENYING PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND OTHER RELIEF, THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS HOLDING THAT WHEN A REMAND ORDER IS BASED UPON GROUNDS OTHER THAN THOSE ENUMERATED IN SECTION 1447(c) OF TITLE 28 OF THE UNITED STATES CODE ANNOTATED, SUCH REMAND ORDER IS REVIEWABLE BY A COURT OF APPEALS BY THE EXTRAORDINARY PEREMPTORY WRIT OF MANDAMUS.

Section 1447(c) of Title 28 of the United States Code Annotated provides in pertinent part that "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. ..." (emphasis added). Section 1447(d) of Title 28 of the United States Code Annotated provides in pertinent part that "[a]n order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise." It is clear, however, that "[t]he Supreme Court has ruled that a remand order based on grounds other than those specified in 28 U.S.C. §1447(c) are subject to review. Accordingly, the remand order may in such instances properly be challenged...by a petition for mandamus." 32 B Am. Jur. 2d Federal Practice and Procedure §2552 at 284 (1982).

The basis for this exception to the rule of nonreviewability of remand orders is the decision of this Court in Thermtron

Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976). Reversing the decision of the Sixth Circuit Court of Appeals holding that mandamus would not issue to a United States District Judge compelling him to revoke his order remanding the action to state court solely because of the district court's crowded docket, this Court, per Justice White, ruled as follows:

> Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. That section and §1447(c) must be construed together. . . .These provisions, like their predecessors, "are in pari materia [and] are to be construed accordingly rather than as distinct enactments. . . ." Employers Reinsurance Corp. v. Bryant, supra, at 380, 81 L. Ed. 289, 57 S. Ct. 273. This means that only remand orders issued under §1447(c) and invoking the grounds specified therein-- that removal was improvident and without jurisdiction -- are immune from review under §1447(d).

423 U. S. at 345-46; 46 L. Ed. 2d at 551; 96 S. Ct. at 590.

> But we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing

> removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. . . .Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not banned by §1447(d).
>
> In so holding we neither disturb nor take issue with the well-established general rule that §1447(d) and its predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute. But this Court has not yet construed the present or past prohibition against review of remand orders so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provisions for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal. We decline to construe §1447(d) so woodenly as to reach that result now.

423 U. S. at 351-52; 46 L. Ed. 2d at 554; 96 S. Ct. at 593.

There remains the question whether absent the bar of §1447(d) against appellate review, the writ of mandamus

> is an appropriate remedy to require the District Court to entertain the remanded action. The answer is in the affirmative.

423 U. S. at 352; 46 L. Ed. 2d at 554; 96 S. Ct. at 593. Thus, under the Thermtron Products decision, when a remand order is based on grounds other than those provided for by section 1447(c), i.e. "improvidently and without jurisdiction," the remand is reviewable by mandamus. The Thermtron Products doctrine of reviewability of non-statutory based remand orders has been embraced and followed in subsequent decisions of the United States Courts of Appeals. See, e.g., Sheet Metal Workers International Association, AFL-CIO v. Seay, 693 F. 2d 1000 (10th Cir. 1982) (remand order vacated); Ryan v. State Board of Elections, 661 F. 2d 1130 (7th Cir. 1981) (remand order in error); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F. 2d 391, 396 n. 9 (5th Cir. Unit B 1981); In re Shell Oil Co., 631 F. 2d 1156 (5th Cir. Unit A 1980); In re Merrimack Mutual Fire Ins. Co., 587 F. 2d 642 (5th

Cir. 1978).

Thus, whether the Court of Appeals erred in refusing to issue a peremptory writ of mandamus to Judge Haltom directing him to vacate his April 13, 1983 Order and accompanying Memorandum of Decision remanding the action from the District Court to the state court, depends upon whether such order and decision were based on the grounds other than that the action was removed "improvidently and without jurisdiction."

The United States Court of Appeals for the Fifth Circuit has construed the term "improvidently" as used in 28 U.S.C.A. §1447(c) as follows:

> Removal cannot have been improvident if all procedural requirements, e.g., timely filing, have been satisfied.
>
> . . .
>
> We conclude that a district court may remand a case as being "improvidently" removed only if one of the statutory non-jurisdictional requirements for removal has not been satisfied. See, Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 131 F. Supp. 262 (E.D. N.Y. 1955). . .

In re Merrimack Mutual Fire Ins. Co., 587 F. 2d 642, 645 n. 3, 647 n. 8 (5th Cir. 1978). The Merrimack decision has been expressly followed by other courts, e.g., Sheet Metal Workers International Association, AFL-CIO v. Seay, 693 F. 2d 1000 (10th Cir. 1982); Ryan v. State Board of Elections, 661 F. 2d 1130 (7th Cir. 1981) and was binding precedent upon the Court of Appeals. Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir. 1981).

Without question, in his remand order, (Appendix at 2), Judge Haltom stated that the action was remanded to the state court because it "was removed improvidently and without jurisdiction". Judge Haltom, however, immediately qualified this statement by the following language:

> for the reasons stated in the Memorandum of Decision filed contemporaneously herewith...

(Appendix at 2). In his Memorandum of Decision Judge Haltom expressly based his remand order solely on two prior unpublished

remand orders issued by other judges in the Northern District of Alabama:

> Defendant has filed a scholarly brief in which it persuasively argues that the better view favors removability of FLSA cases. However, in Price v. Asplundth Tree Expert Company, CA No. 64-284-S (N.D. Ala. 1964) (unpublished order -- copy attached), Judge Seybourn H. Lynne held that an action under the FLSA was due to be remanded as improvidently removed. This holding was later followed by then Chief Judge Frank K. McFadden in Goldkist, Inc. v. Black, CV 80-M-1133-W (N.D. Ala. 1980) (unpublished order -- copy attached). Conceding that there is meritorious argument to be made for removal of FLSA cases, this member of the court declines to depart from the precedent of the United States District Court for the Northern District of Alabama enumerated above until such time as a definitive ruling is made either by the United States Court of Appeals for the Eleventh Circuit or by the Supreme Court of the United States.

(Appendix at 8). In so ruling Judge Haltom also made the following critical observation:

> Defendant [Petitioner] timely petitioned this court for removal of the action to the Northern District of Alabama, Northeastern Division.

(Appendix at 4). Thus, contrary to the conclusory statement in his order that the action was "improvidently" removed, Judge Haltom expressly acknowledged in his Memorandum of Decision that Petitioner had indeed providently removed the action. Cf. Royal v. State Farm Fire and Casualty Co., 685 F 2d 124 (5th Cir. 1982); London v. United States Fire Ins. Co., 531 F. 2d 257 (5th Cir. 1979) (improvident removal encompasses untimely removal).

In both the District Court and the Court of Appeals below, no doubt existed that Petitioner removed the action to the District Court under four separate bases of original jurisdiction: (1) federal question jurisdiction, 28 U.S.C.A. §1331; (2) diversity of citizenship jurisdiction, 28 U.S.C.A. §1332; (3) regulation of commerce jurisdiction, 28 U.S.C.A. §1337; and FLSA jurisdiction, 29 U.S.C.A. §216(b). In his Memorandum of Decision Judge Haltom expressly acknowledged that the District Court had original

jurisdiction of the action:

> it is clear that this court would have original jurisdiction over this action, see 29 U.S.C. §216(b), and that this court is admittedly the district court of the United States for the district and division embracing the place where such action was pending... .

(Appendix at 5), thus again directly contradicting the conclusory language of his order that the action was removed "without jurisdiction." Because Judge Haltom expressly acknowledged that the action was removed to the District Court "providently and with jurisdiction", it follows that he exceeded his authority by remanding the action to the state court and that a peremptory writ of mandamus should have issued from the Court of Appeals directing him (1) to vacate his Remand Order and accompanying Memorandum of Decision and (2) to proceed to the trial of the action. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976); Sheet Metal Workers International Association, AFL-CIO v. Seay, 693 F. 2d 1130 (7th Cir.

1981); 1A Moore's Federal Practice ¶0.169 [2.-1] at 694 (2d rev. ed. 1983) ("Mandamus will lie where a properly removed case is remanded for reasons not authorized by statute.")

A peremptory writ of mandamus will lie to a United States District Judge to compel him to exercise his authority when it is his duty to do so. See 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §3933 at 222 (1977). As this Court has ruled:

> The peremptory writ of mandamus has traditionally been used in the federal courts only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

Will v. United States, 389 U.S. 90, 95, 19 L. Ed. 2d 305, 310, 88 S. Ct. 269 (1967) (emphasis added) (quoting Roche v. Evaporated Milk Association, 319 U. S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938 (1943)). See also, Ex parte Republic of Peru, 318 U. S. 578, 87 L. Ed. 1014, 63 S. Ct. 793

(1943); Ex parte Parker, 120 U.S. 737, 30 L. Ed. 818, 7 S. Ct. 767 (1887); Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392 (1881); 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §3932 at 186 (1977). And even so, when the writ is in aid of the prospective jurisdiction of the appellate court. Roche v. Evaporated Milk Association, 319 U. S. 21, 87 L. Ed. 1185, 63 S. Ct. 938 (1943); McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762, 30 S. Ct. 501 (1910); United States v. Christian, 660 F. 2d 892 (3rd Cir. 1981); In re Halkin, 598 F. 2d 176 (D.C. Cir. 1979); 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure, §3932 at 190-91, 195 (1977).

Because section 1447(c) of Title 28 of the United States Code Annotated states the exclusive grounds for remand, In re Merrimack Mutual Fire Ins. Co. 587 F. 2d 642 (5th Cir. 1978); Shaw v. Munford, 526 F. Supp. 1209 (S.D.N.Y. 1981); Gottlieb v. Firestone Steel Products Co., 524 F. Supp. 1137 (E.D.

Pa. 1981), it clearly and indisputably follows that Judge Haltom erred in remanding the action on non §1447(c) grounds, i.e. prior unpublished orders of the Northern District of Alabama, because persons who meet the statutory requirements of federal jurisdiction have a statutory and constitutional right to resort to the federal courts. In re Southwestern Bell Telephone Co., 535 F. 2d 859 (5th Cir. 1976). Furthermore under the Thermtron doctrine, when a court articulates a non §1447(c) ground for its remand order, the appellate court must review the remand order, In re Shell Oil Co., 631 F. 2d 1156 (5th Cir. 1980); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F. 2d 391 (5th Cir. 1981), which review must be by mandamus and not by appeal. Royal v. State Farm Fire and Casualty Co., 685 F. 2d 124 (5th Cir. 1982); In re Merrimack Mutual Fire Ins. Co., 587 F. 2d 642 (5th Cir. 1978); Gordon v. United States Fire Ins. Co., 531 F. 2d 257 (5th Cir. 1976).

Consequently, the Court of Appeals erred in issuing its June 30, 1983 order finding that it had no jurisdiction over Petitioner's Petition for Writ of Mandamus because in so ruling the Court of Appeals ruled in a manner directly in conflict with the decision of this Court in the Thermtron case. When a court of appeals rules in a manner in conflict with binding precedent of this Court, its ruling is subject to review by a writ of certiorari. New York City Transit Authority v. Beazer, 440 U. S. 568, 59 L. Ed. 2d 589, 99 S. Ct. 1355 (1979); Vermont Yankee Nuclear Corp. v. National Resources Defense Council, Inc., 435 U. S. 519, 55 L. Ed. 2d 460, 98 S. Ct. 1197 (1978); Monroe v. Pape, 365 U. S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961); Rule 17.1(c), United States Supreme Court Rules. In so ruling the Court of Appeals also ruled in a manner directly in conflict with decisions of various courts of appeals decided under Thermtron: "When a federal court of appeals

has rendered a decision of another federal court of appeals on the same matter", certiorari review is available. Rule 17.1(a), United States Supreme Court Rules; Butner v. United States, 440 U. S. 48, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979); Brennan v. Arnheim and Neely, Inc., 410 U. S. 512, 35 L. Ed. 2d 463, 93 S. Ct. 1138 (1973); Commissioner of Internal Revenue v. Bosch, 387 U. S. 456, 18 L. Ed. 2d 886, 87 S. Ct. 1776 (1967).

Because the Court of Appeals erroneously ruled that it had no jurisdiction to review Petitioner's Petition for Writ of Mandamus and Other Relief, which ruling was in direct conflict with this Court's decision in Thermtron and decisions of the courts of appeals decided under Thermtron, a writ of certiorari should issue from this Court to review the Court of Appeals said June 30, 1983 Order denying Petitioner's Petition for Writ of Mandamus and Other Relief.

2. IN DENYING PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND OTHER RELIEF THE COURT OF APPEALS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THE UNITED STATES SUPREME COURT AND THE UNITED STATES COURTS OF APPEALS HOLDING THAT WHEN A FEDERAL DISTRICT COURT IS FACED WITH AND DECIDES A NOVEL, IMPORTANT AND UNSETTLED QUESTION OF LAW, ITS DECISION IS REVIEWABLE BY A COURT OF APPEALS BY THE EXTRAORDINARY ADVISORY AND SUPERVISORY WRIT OF MANDAMUS.

Although neither the FLSA nor any other congressional enactment contain an express provision prohibiting removal of FLSA suits to the United States district courts, a split of authority exists among the federal district courts whether such actions originally commenced in a state court having jurisdiction thereof may be removed to a United States district court. Compare Nieves v. Deshler, 561 F. Supp. 1173 (D.P.R. 1983)(removable); Taylor v. Brown, 461 F. Supp. 559 (E.D. Tenn. 1978) (removable); Barrett v. McDonald's of Oklahoma City, 419 F. Supp. 792 (W.D. Okla. 1976)(removable); Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970)(removable) with Carter v. Hill and Hill Truck Lines, Inc.,

259 F. Supp. 429 (S.D. Tex. 1966)(nonremovable); Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N.D. Tex. 1964)(nonremovable); Zorilla v. Puerto Rican Cement Co., 227 F. Supp. 159 (D.P.R. 1964)(nonremovable). See generally, Annot., 10 ALR Fed. 919 (1972). Prior to the September 1, 1948 amendment of the removal statute, 28 U.S.C.A. §1441(a), the majority of the decisions on this question held that a FLSA suit originally filed in state court could not be removed to a United States district court. Id. Subsequent to that amendment, however, the majority of decisions holds that an action so situated is removable. Id.

The issue is whether a suit under the FLSA originally filed in a state court having jurisdiction thereof is removable to a United States district court is an important and unsettled question of law in that (1) it has remained unanswered and has escaped federal appellate review for over 40 years, (2) has never been directly addressed

by any of the United States Court of Appeals or the United States Supreme Court since the 1948 amendment to the removal statute and (3) is one that Judge Haltom acknowledged in his Memorandum of Decision should be resolved by this Court or the Court of Appeals. (Appendix at 9). Furthermore, as previously noted, the issue is not reviewable by appeal. As such, it was ripe for determination by the Court of Appeals by an advisory and supervisory writ of mandamus.

In Schlagenhauf v. Holder, 379 U. S. 104, 13 L. Ed. 2d 152, 85 S. Ct. 234 (1964), this Court was faced with a petition for a writ of mandamus challenging a district court discovery order requiring a defendant to submit to a mental and physical examination pursuant to Rule 35(a) of the Federal Rules of Civil Procedure. Holding inter alia, that mandamus was the proper remedy for resolution of the question of first impression before it, this Court ruled:

> Here petitioner's basic allegation was lack of power in a district court to order a mental and physical examination of a defendant. That this issue was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts under Rule 35 and we have found only one such modern case in the state courts. The Court of Appeals recognized that it had the power to review on a petition for mandamus the basic, undecided question of whether a district court could order the mental or physical examination of a defendant. We agree that, under these unusual circumstances and in light of the authorities, the Court of Appeals had such power.

379 U. S. at 110-13; 13 L. Ed. 2d at 159-60; 85 S. Ct. at 238-39 (emphasis added). Other decisions of this Court are in accord, see, e.g., Will v. United States, 389 U. S. 90, 19 L. Ed. 2d 305, 88 S. Ct. 269 (1967); La Buy v. Howes Leather Company, 352 U. S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957), as are decisions of the United States Courts of Appeals. See, e.g., In re Cement Antitrust Litigation, 688 F. 2d 129 (9th Cir. 1982);

Herrera v. Payne, 673 F. 2d 307 (10th Cir. 1982); Hamilton v. Morial, 644 F. 2d 351 (5th Cir. Unit A 1981); Wilk v. American Medical Association, 635 F. 2d 1295 (7th Cir. 1981); In re Vuitton et Fils, S.A., 606 F. 2d 1 (2nd Cir. 1979); National Right to Work Legal Defense and Education Foundation, Inc. v. Richey, 510 F. 2d 1239 (D.C. Cir. 1975); Colonial Times, Inc. v. Gasch, 509 F. 2d 517 (D.C. Cir. 1975); United States v. Hughes, 413 F. 2d 1244 (5th Cir. 1969). The commentators are in agreement that an advisory and supervisory writ of mandamus will issue to an inferior federal tribunal to instruct it in the proper resolution of an important, novel and unresolved question of law which is otherwise unreviewable. See, 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure §3934 (1977); 32A Am. Jur. 2d Federal Practice and Procedure §963 (1982).

Review by certiorari is available when a Court of Appeals has decided an "important

question of federal law which has not been, but should be settled by [the Supreme] Court." Rule 17.1(c), Rules of the United States Supreme Court; Milliken v. Bradley, 418 U.S. 717, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); United States v. Nixon, 418 U. S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974); Glidden v. Zdanok, 370 U. S. 530, 8 L. Ed. 2d 671, 82 S. Ct. 1459 (1962). Although the Court of Appeal's June 30, 1983 ruling did not specifically address the unresolved question of removability of a FLSA suit originally filed in a state court of competent jurisdiction, its refusal to issue a Writ of Mandamus to the District Court implicitly, and as a practical matter, affirmed the District Court's April 13, 1983 remand order and memorandum of decision. Thus, this Court should issue a Writ of Certiorari to instruct the Court of Appeals in the proper resolution of this question. Furthermore, because of the distinct split of authority on this important question of federal statutory labor law which undoubtedly affects millions

of employees, this Court should issue a Writ of Certiorari to the Court of Appeals to instruct it in the proper resolution thereof. "General public importance of the issues, and the need to secure uniformity of federal law, must be the basic touchstones" for the issuance of a writ of certiorari, 16 C. Wright, A. Miller, E. Cooper and E. Gressman, Federal Practice and Procedure, §4004 at 508 (1977), which should also be issued to resolve "a statutory question likely to have widespread impact." Id.

3. IN DENYING PETITIONER'S PETITION FOR WRIT OF MANDAMUS AND OTHER RELIEF THE COURT OF APPEALS IMPLICITLY AND ERRONEOUSLY DECIDED A PREVIOUSLY UNRESOLVED QUESTION OF FEDERAL STATUTORY LABOR LAW OF NATIONAL IMPORTANCE WHICH SHOULD BE DECIDED BY THE UNITED STATES SUPREME COURT

By refusing to consider Petitioner's Petition for Writ of Mandamus and Other Relief and thus leaving the District Court's remand order intact, the Court of Appeals implicitly decided a previously unresolved question of federal statutory labor law of national importance which should be decided by this Court: whether a suit under the FLSA originally filed in a state court having jurisdiction thereof is removable to a United States District Court under the federal removal statutes. For reasons set forth below, the Court of Appeals' implicit resolution of this question of national importance was clearly erroneous.

Subsection (b) of section 216 of Title 29 of the United States Code Annotated, the FLSA jurisdictional provision, provides in pertinent part that:

> (b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. ... An action to recover the liability prescribed in either of the preceding sentences may be maintained in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. ...

(emphasis added). The general removal statute, §1441 of Title 28 of the United States Code Annotated, provides in pertinent part that:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(emphasis added).

Exhaustive research by Petitioner reveals no act of Congress which expressly prohibits removal to a United States district

court of a FLSA suit originally filed in a state court having jurisdiction thereof. Therefore, pursuant to section 1441(a) removal of FLSA actions should be permitted without further inquiry.

Although no express provisions in the FLSA or any other congressional enactment exist prohibiting removal of FLSA suits to a United States district court, a split of authority exists among the federal decisions whether such actions originally commenced in a state court having jurisdiction thereof may be removed to a United States district court. Compare Nieves v. Deshler, 561 F. Supp. 1173 (D.P.R. 1983)(removable); Taylor v. Brown, 461 F. Supp. 559 (E.D. Tenn. 1978) (removable); Barrett v. McDonald's of Oklahoma City, 419 F. Supp. 792 (W.D. Okla. 1976) (removable); Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970)(removable) with Carter v. Hill and Hill Truck Lines, Inc., 259 F. Supp. 429 (S.D. Tex. 1966)(non-removable); Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N.D. Tex. 1964)

(nonremovable); Zorilla v. Puerto Rican Cement Co., 227 F. Supp. 159 (D.P.R. 1964) (nonremovable). See generally, Annot., 10 ALR Fed. 919 (1972). Prior to the September 1, 1948 amendment of §1441(a), the majority of the decisions held that a FLSA suit originally filed in state court could not be removed to a United States district court. Id. Subsequent to that amendment, however, the majority of decisions holds that an action so situated is removable. Id. Because "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise", 28 U.S.C.A. §1447(c), and the exception to this rule created in Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976), discussed above, was not announced until 1976, no decisions of this Court or of the United States Courts of Appeals on this question have been rendered since 1948. Prior to 1948, there were only two United States Courts of Appeals decisions on this question. One of the de-

cisions, discussed below, implicitly allows removal of a FLSA suit, whereas the other holds that a FLSA suit may not be removed, but is based upon considerations no longer valid in view of the 1948 amendment to the removal statute. For ease of understanding, the discussion of the cases wherein this question was litigated will be divided among those decided prior to the September 1, 1948, the effective date of the amendment of the removal statute, and those rendered subsequent to that time.

a. Pre-1948 decisions permitting removal.

Of all of the decisions issued by the United States district courts prior to the 1948 amendment of the removal statute, 28 U.S.C. §1441(a), which permit removal of FLSA suits probably the most important are those which allow removal on the ground that there is no expression of congressional intent within the FLSA or any other congressional enactment to deny removal of FLSA suits. See, e.g., Swettman v. Remington Rand, Inc.,

65 F. Supp. 940 (S. D. Ill. 1946); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Harris v. Reno Oil Co., 48 F. Supp. 908 (N. D. Tex. 1943); McGarrigle v. 11 West Forty-Second Street Corp., 48 F. Supp. 710 (S.D.N.Y. 1942); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942). These decisions are quite instructive in light of the subsequent 1948 amendment to §1441(a) which allows removal "[e]xcept as otherwise expressly provided for by Act of Congress". Furthermore, several courts have opined that if Congress had intended to deny removal to a United States district court of an action under the FLSA, it would have expressly stated such an intent. See, e.g., Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Harris v. Reno Oil Company, 48 F. Supp. 908 (N.D. Tex. 1943); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942).

An equally compelling reason for allowing removal of a FLSA suit is that by

the express provisions of §216(b) of the FLSA concurrent jurisdiction over FLSA suits is granted to both the state and federal courts. Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E.D. Ky. 1943); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942); Sheridan v. Leitner, 44 N.Y.S. 2d 570 (City Court of N.Y. 1943).

Contrary to several of the pre-1948 decisions which prohibited removal of FLSA suits on the basis of the express language in section 216(b) of the FLSA, several pre-1948 federal district court decisions expressly hold that the language "may be maintained in any court of competent jurisdiction" in §216 (b) does not mean that a FLSA suit originally filed in state court must be prosecuted to final judgment in that court. See, Swettman v. Remington Rand, Inc., 65 F. Supp. 940 (D. C. Ill. 1946); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E.D. Ky. 1943); Harris v. Reno Oil Co., 48 F. Supp.

908 (N. D. Tex. 1943); Ricciardi v. Lazzara Baking Corp., 32 F. Supp. 956 (D. N.J. 1940).

Any argument that Respondents may make to the effect that the "may be maintained in any court of competent jurisdiction" language of §216(b) of the FLSA impliedly repealed the removal statute is likewise indefensible in light of the following authorities: Aaker v. Kaiser Co., Inc., 74 F. Supp. 55 (D. Ore. 1947); Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D. Minn. 1944); Cox v. Gatliff Coal Co., 52 F. Supp. 482 (E. D. Ky. 1943); Owens v. Greenville News-Piedmont, 43 F. Supp. 785 (W.D.S.C. 1942).

Before turning to a discussion of the post 1948 decisions, Petitioner cites the United States Court of Appeals for the Tenth Circuit's decision in Mid-Continent Pipe Line Co. v. Hargrave, 129 F. 2d 655 (10th Cir. 1942) as implied authority from the proposition that removal of FLSA suits originally filed in state court is appropriate:

> Instead of Congress limiting to the Federal Courts jurisdiction of an action for the recovery of

> overtime compensation in liquidated damages under the Act, it expressly provided that such an action may be maintained in any Court of competent jurisdiction. And the District Courts in Oklahoma are courts of general jurisdiction Section 16(b), supra, and Title 12, §223, supra, construed together, clearly authorized the maintenance of the action in the State court in the name of the agent, and it was likewise maintainable in that matter after removal.

120 F. 2d at 659 (emphasis added). Although the Court of Appeals for the Tenth Circuit in Hargrave was determining who was the real party in interest in the action, the last portion of the above-quoted ruling indicates that the court implicitly approved removal of the FLSA suit under review from the Oklahoma state court to the Oklahoma United States District Court.

b. Post-1948 decisions permitting removal.

The majority of the decisions of the United States district courts issued subsequent to the September 1, 1948 amendment to §1441(a) hold that FLSA suits originally filed in state court may be removed to a

United States district court. The commentators note the split of authority on the question, but imply that such actions should be removable. See 1A Moore's Federal Practice, ¶0.167[5] at 472 (2d rev. ed. 1983) ("Prior to the Code of 1948 there were conflicting decisions as to whether removal of a state action was prevented by the provision of the Act that the employee's suit "may be maintained in any court of competent jurisdiction." This ambiguous phrase is certainly not an express provision against removal within the meaning of §1441 of the Code of 1948, but the courts still remain divided on the question removability.") (emphasis added); See 14 C. Wright and A. Miller, Federal Practice and Procedure §3729 (1976).

As noted above, the general removal statute, 28 U.S.C.A. §1441(a) was revised by amendment effective September 1, 1948. The predecessor to section 1441, 28 U.S.C.A §71, as amended, provided as follows:

> Removal of suits from State Courts. Any suits of a civil

> nature, at law of in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the District Courts of the United States are given original jurisdiction, and any State Court may be removed by the Defendant or Defendants therein to the District Court of the United States for the proper district. . . .

As of September 1, 1948, section 1441(a) of Title 28 of the United States Code Annotated replaced former section 71 with the following language:

> (a) Except as otherwise exprssly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

(emphasis added). Thus the major change in the general removal statute effectuated by the amendment effective September 1, 1948 was to provide that all civil actions brought in state courts of which the United States district courts have original

jurisdiction may be removed "except as otherwise expressly provided by Act of Congress." This amendment is very important in resolving the question of whether FLSA suits are removable as it is a clear expression of Congressional intent.

Petitioner's research reveals that since the 1948 amendment of §1441(a), no less than twelve decisions of continuing validity have been rendered by United States district courts sustaining the removal of a FLSA suit originally filed in state court. Nieves v. Deshler, 561 F. Supp. 1173 (D.P.R. 1983); Taylor v. Brown, 461 F. Supp. 559 (E.D. Tenn. 1978); Barrett v. McDonald's of Oklahoma City, 419 F. Supp. 792 (W.D. Okla. 1976); Anthony v. West Coast Drug Co., 331 F. Supp. 1279 (W. D. Wash. 1971); Hill v. Moss-American, Inc.; 309 F. Supp. 1175 (N.D. Miss. 1970); Goettel v. Glenn Berry Mfrs., Inc., 236 F. Supp. 884 (N.D. Okla. 1964); Niswander v. Paul Hardeman, Inc., 223 F. Supp. 74 (E.D. Ark. 1963); Buckles v. Morristown Kayo Co.,

132 F. Supp. 555 (E.D. Tenn. 1955); Rossi v. Singer Sewing Machine Co., 127 F. Supp. 53 (D. Conn. 1954); Green v. Fluor Corp., 122 F. Supp. 224 (S.D.N.Y. 1954); Asher v. William L. Crow Construction Co., 118 F. Supp. 495 (S.D.N.Y. 1953); Korell v. Bymart, Inc., 101 F. Supp. 185 (E.D.N.Y. 1951). As was the central issue prior to the 1948 amendment to the removal statute, the primary consideration in resolution of the issue remains Congressional intent.

Thus, the fact that the FLSA contains no provision either allowing or prohibiting removal, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970); Goettel v. Glenn Berry Mfrs. Inc., 236 F. Supp. 884 (N.D. Okla. 1964); the fact that it is duty of Congress to expressly prohibit removal, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970); the fact that section 1441(a) was specifically revised in 1948, Rossi v. Singer Sewing Machine Co., 127 F. Supp. 53 (D. Conn. 1954), with knowledge of

prior decisions construing the removability of FLSA suits, Korell v. Bymart, Inc., 101 F. Supp. 185 (E.D.N.Y. 1951); the fact that no act of Congress expressly prohibits removal, Buckles v. Morristown Kayo Co., 132 F. Supp. 555 (E.D. Tenn. 1955); and the fact that denial of removability of other types of actions has been done in an unequivocal manner, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970), have all been used as bases for sustaining the removal to the United States district courts of FLSA actions originally filed in state court.

Removal has also been upheld on the ground that the removal statute is controlling over the "may be maintained in any court of competent jurisdiction" provision of section 216(b) of the FLSA. See, Niswander v. Paul Hardeman, Inc., 223 F. Supp. 74 (E.D. Ark. 1963); Rossi v. Singer Sewing Machine Co., 127 F. Supp. 53 (D. Conn. 1954). Furthermore, in light of the 1948 amendment to §1441(a), the word "maintain" as used in section 216(b)

of the FLSA which had previously been the source of much litigation, has been held to be of no real importance. See, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970); Rossi v. Singer Sewing Machine Co., 127 F. Supp. 53 (D. Conn. 1954).

Before concluding discussion of the post-1948 decisions permitting removal to the United States district courts of a FLSA action originally filed in state court. especial discussion is merited of the most recent district court opinion out of the Fifth Circuit litigating this issue. Because the Court of Appeals was formerly within the Fifth Circuit, this decision, although not controlling, was certainly instructive. See, Bonner v. City of Prichard, 661 F. 2d 1206 (11th Cir. 1981).

In Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N. D. Miss. 1970) the United States District Court for the Northern District of Mississippi denied a plaintiff's motion to remand a FLSA suit to state court.

Recognizing that the federal removal statute had been amended in 1948 and that because numerous federal courts were split on the issue before it and "the choice for [it] is to follow [its] own rule, which is not yet settled by precedent within the district or by the Court of Appeals for the Fifth Circuit", 309 F. Supp. at 1177, the court went on to rule that congressional intent was clear that their FLSA suits are removable:

> It is significant to us that in all other cases of original jurisdiction where Congress has denied removability, it has done so in clear and unmistakable words. Having legislated in various fields in employee-employer activity and having created new rights in many of them, Congress has always unequivocably manifested its purpose if access to federal courts through removal is to be barred.
>
> Quite a different situation obtains in the case of the FLS Act. No mention of removal was made in the Act iself and no reference is made to it in the general removal or other Federal statutes. By the amendatory language of §1441(a) removal jurisdiction exists in any case of which the federal district court has original jurisdiction except as otherwise expressly provided by act of Congress. The command of this language is indisputedly clear so that nothing short of an express statutory provision may preclude removal. This renders, in our view, irrelevant the

correct meaning of the word "maintain" which is susceptible of two possible, reasonable interpretations, either to commence or to prosecute to a conclusion where neither connotation expressly negatives removal. We must reject the construction of the word or words which would imply a Congressional intent against removal since Congress itself has declared that denial of removal must be "expressly provided."

Although we acknowledge that good policy reasons might be advanced for allowing the employees to select the forum for this kind of litigation and prevent delay and possible annoyance by forbidding the employee to remove the action to federal court, we were not persuaded that Congress has yet adopted such legislation, and that it is up to Congress, and not this court, to do so. Nor can one fairly categorize FLS actions. Barring removal of FLSA cases will shut out controversies involving dollar amounts ranging from quite large to very small, concerning interpretations of an Act of Congress ranging from difficult to routine, between persons who may or may not be of diverse citizenship, in localities where the congestion of trial dockets as between state and federal courts may be great or unremarkable. These and various other considerations must be addressed to Congress which has thus far enunciated a statutory policy of allowing removal unless it clearly and directly ("expressly") provides otherwise. Granting that Congress has indicated its wish in other legislation to reduce the present congestion of federal courts by adopting a policy limiting federal court jurisdiction in the general field of employee compensation nevertheless in

> FLS wage cases it is the prerogative of Congress and not this court, to foreclose removal.
>
> Motion to remand is denied.

309 F. Supp. 1177-78 (emphasis in original). The analysis, logic and reasoning of the Hill opinion is unassialable and Petitioner urges this Court to adopt its reasoning.

As an additional basis for its position that FLSA suits may be removed to the United States district courts, Petitioner brings to the Court's attention that in numerous instances where Congress has desired to prohibit removal of actions, it has done so by an express legislative act. See, 28 U.S.C.A. §1445(a); 28 U.S.C.A. §1445(b); 28 U.S.C.A. §1445(c); 15 U.S.A. §77(v)(a); 46 U.S.C.A. §688.

In several recent decisions various federal courts have held that because no express congressional intent prohibiting removal could be found, removal to a United States district court of claims asserted under various federal statutes was permissible. The leading decision on this point is that of the United States Court

of Appeals for the Fifth Circuit in Baldwin v. Sears, Roebuck & Co., 667 F. 2d 458 (5th Cir. 1982) in which the Fifth Circuit addressed the removability of suits under the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§621 et. seq. Affirming the district court decision refusing to remand the action the Fifth Circuit ruled:

> Unless, therefore, there is an express declaration by Congress to the contrary, all types of civil actions, in which there is concurrent original jurisdiction in both federal and state courts, are removable. It is undisputed that a federal court would have original jurisdiction of this action.
>
> Section 7(c) of the ADEA provides that: '[a]ny aggrieved person may bring a civil action in any court of competent jurisdiction . . . .' 29 U.S.C. §626(c)(1).
>
> Examining this specific language contained in ADEA, we note that Congress chose to use the words, "...may bring a civil action in any court of competent jurisdiction. ..." 29 U.S.C. §626(c)(1). This language clearly suggestes that a plaintiff may institute suit based on the ADEA in either state or federal court. It does not indicate an intent on the part of Congress, however, to allow

> plaintiff to prosecute this suit to final judgment in that court. In short, we find no express prohibition against removal pursuant to 28 U.S.C. §1441(a). Accordingly, the District Court's refusal to remand the case to the Mississippi State Court was proper.

667 F. 2d at 459-61. (emphasis added).

Other recent cases on this point also merit the Court's attention. See, e.g., McConnell v. Marine Engineers Beneficial Ass'n., 528 F. Supp. 770 (N.D. Cal. 1981); Colin K. v. Schmidt, 528 F. Supp. 355, 356-57 (D.R.I. 1981); Sicinski v. Reliance Funding Corp., 461 F. Supp. 649 (S.D. N.Y. 1978); Jacobi v. High Point Label, Inc., 442 F. Supp. 518 (N.D.N.C. 1977); Haun v. Retail Credit Company, 420 F. Supp. 859, 863 (W.D. Pa. 1976).

Thus, it is evident that when Congress intends to prohibit removal of an action from state court to a United States district court, it has legislatively enacted such a prohibition. Because Congress has enacted no express legislative provision prohibiting removal of FLSA suits to the United States

district courts, it follows that such suits may be removed.

CONCLUSION

Because the Distric Court remanded the action to the state court solely on the basis of two prior unpublished remand orders of the United States District Court for the Northern District of Alabama and not upon a ground established by 28 U.S.C.A. §1447(c), the Court of Appeals erred in ruling that it had no jurisdiction by which to consider Petitioner's Petition for Writ of Mandamus and Other Relief under this Court's decision in Thermtron Products, Inc. v. Hermansdorfer, 423 U. S. 335, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976). The Court of Appeals also erred in so ruling because an unresolved question of federal statutory labor law of national importance was raised by Petitioner's Petition for Writ of Mandamus and Other Relief: whether a suit under the FLSA originally filed in a state court of competent jurisdiction is removable to

a United States District Court under the federal removal statutes.

Because the Court of Appeal's ruling that it had no jurisdiction by which to entertain Petitioner's Petition for Writ of Mandamus and Other Relief is in conflict with this Court's decision in Thermtron and because the Court of Appeal's ruling implicitly affirmed the District Court's resolution of a question of federal statutory labor law of national importance yet unresolved by this Court, and because the District Court's and Court of Appeal's resolution of this question was clearly erroneous, a Writ of Certiorari must issue from this Court to the Court of Appeals directing it to (1) vacate its June 30, 1983 order wherein it ruled that it had no jurisdiction to review the April 13, 1983 order of the District Court which remanded this action to the State Court, (2) to order the District Court to vacate its April 13, 1983 Order and accompanying

memorandum of decision remanding the action from the District Court to the State Court, (3) to order the District Court to enter an Order ruling that the action was providently and properly removed under original jurisdiction to the District Court, and (4) to order the District Court to proceed to the trial of the action.

Respectfully submitted,

Frank K. Noojin,
Local Counsel for
Petitioner Record Data,
Inc., a corporation
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Huntsville, AL 35804
Telephone No. (205) 533-3500

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I, Frank K. Noojin, of Watts, Salmon, Roberts, Manning & Noojin, Local Counsel for Petitioner Record Data, Inc., a corporation and Counsel of Record for Petitioner, pursuant to Rules 28.2, 28.3 and 28.5 of the Rules of the United States Supreme Court

hereby certify that I have this day served three (3) copies of the foregoing Petition For a Writ of Certiorari upon each of the following parties who are all of the parties required to be served with the same: (1) the Honorable E. B. Haltom, Jr., Respondent; (2) Dennis E. O'Dell, attorney for Respondent Jack F. Neal; and (3) Barton J. Craig, attorney for Defendant Record Data of Alabama, Inc., by mailing said copies to them by depositing the same in a United States post office, with first-class (priority), postage prepaid at their respective addresses at (1) the United States Courthouse, 101 Holmes Avenue, Huntsville, Alabama 35804; (2) 201 East Side Square, Huntsville, Alabama 35801; and (3) 725 St. Clair Avenue, N. W., Cleveland, Ohio 44113.

Done this the 24th day of September, 1983.

Frank K. Noojin,
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Telephone (205) 533-3500

Counsel of Record
for Petitioner

STATE OF ALABAMA)

COUNTY OF MADISON)

SWORN TO and subscribed before me on this the 24th day of September, 1983.

Notary Public
State of Alabama
County of Madison

APPENDIX

ORDER OF THE UNITED STATES
DISTRICT COURT FOR
THE NORTHERN DIVISION OF
ALABAMA, NORTHEASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK F. NEAL	)	
	)	
Plaintiff	)	
	)	
-v-	)	NO. CV 83-HM-5257-NE
	)	
RECORD DATA, INC., a corporation, et al.	)	
	)	
	)	
Defendants	)	

O R D E R

It appearing to the court that this action was removed improvidently and without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that this cause be and the same hereby is REMANDED to the Circuit Court of Madison County, Alabama, from whence it was removed.

The clerk of court is directed to send a certified copy of this order of remand to the clerk of such state court. Costs are taxed against the removing defendant.

DONE and ORDERED this 13th day of April, 1983.

/s/ E. B. Haltom, Jr.
E. B. HALTON, JR.,
United States District Judge

MEMORANDUM OF DECISION OF
THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA,
NORTHEASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK F. NEAL, Plaintiff,	)
vs.	) NO. CV82-HM-5257-NE
RECORD DATA, INC., a corporation, et al. Defendants.	)

MEMORANDUM OF DECISION

This cause came on to be heard at the scheduled motion docket of this court upon motion of plaintiff to remand this cause to the Circuit Court of Madison County, Alabama. Plaintiff originally brought this action for overtime compensation under the Fair Labor Standards Act in the Circuit Court of Madison County, Alabama. Defendant timely petitioned this court for removal of the action to the Northern District of Alabama, Northeastern Division. In its petition defendant asserts that this court has original jurisdiction

over this action pursuant to the provisions of 28 U.S.C. §§1331 and 1332, and that this action is properly removed pursuant to the provisions of 28 U.S.C. §1441. Thereafter plaintiff filed a motion to remand this case to the Circuit Court of Madison County. In his motion plaintiff argues that this action may be maintained in any court of competent jurisdiction pursuant to 29 U.S.C.A. §216(b) and thus the action is not removable to federal district court under 28 U.S.C. §1441.

28 U.S.C. §1441(a) reads as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Since it is clear that this court would have original jurisdiction over this action, see 29 U.S.C. §216(b), and that this court is admittedly the district court

of the United States for the district and division embracing the place where such action was pending, the narrow question left for the court to determine is whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. §§201-219 (FLSA).

The enforcement provisions of the FLSA are found in 29 U.S.C. §216, which provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. §216(b).

There is substantial conflict among the authorities on the issue of removal of FLSA cases. See Bintrim v. Bruce-Merilees Electric Company, 520 F.Supp. 1026 (W.D. Pa. 1981); Griffin v. Hooper-Holmes Bureau,

Inc., 413 F. Supp. 107 (M. D. Fla. 1976); 1A J. Moore, Moore's Federal Practice ¶0.167[5] n.5 (2d ed. 1982) (impliedly criticizing those cases not allowing removal); 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3729 (1976). Disagreement centers around the interpretation of the language in 29 U.S.C. §216(b) providing that an action may be "maintained" against an employer in any Federal or State court of competent jurisdiction. One line of authority holds that by using the word "maintained" Congress intended not only that the action might be commenced in any court of competent jurisdiction, but that it could be continued until final judgment in the court in which it was commenced. Johnson v. Butler, 162 F. 2d 87 (8th Cir. 1947); Bintrim, 520 F. Supp. at 1027; Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N.D. Tex. 1964). These courts have therefore viewed this language as an express provision against removal within the meaning of 28 U.S.C. §1441(a).

On the other hand, other courts have allowed removal of FLSA cases, arguing that the language in the FLSA permitting actions to be "maintained" in either Federal or State court (1) implies only that actions may be commenced in either court, and does not grant a right to prosecute the case to conclusion in the chosen forum, and (2) does not constitute an express provision prohibiting removal, as is required by the general removal statute, 28 U.S.C. §1441(a). 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3729 (1976). See, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N. D. Miss. 1970).

Defendant has filed a scholarly brief in which it persuasively argues that the better view favors removability of FLSA cases. However, in Price v. Asplundth Tree Expert Company, CA No. 64-284-S (N.D. Ala. 1964) (unpublished order--copy attached) Judge Seybourn H. Lynne held that an action under the FLSA was due to be remanded as

improvidently removed. This holding was later followed by then Chief Judge Frank H. McFadden in Goldkist, Inc. v. Black, CV 80-M-1133-W (N.D. Ala. 1980) (unpublished order--copy attached). Conceding that there is meritorious argument to be made for removal of FLSA cases, this member of the court declines to depart from the precedent of the United States District Court for the Northern District of Alabama enumerated above until such time as a definitive ruling is made either by the United States Court of Appeals for the Eleventh Circuit or by the Supreme Court of the United States. Consequently, the court holds that, this action having been commenced in the state circuit court, it was improvidently removed to this court and must be remanded. In so holding, the court concurs with the decisions of Price and Goldkist, supra.

An appropriate order remanding this action to the Circuit Court of Madison County, Alabama will be entered.

/s/ E. B. Haltom, Jr.
E. B. HALTOM, JR.,
United States District
Judge

April 13, 1983

BOBBY JOE PRICE,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
vs.	)	No. 64-284
	)	
ASPLUNDTH TREE EXPERT COMPANY, a corporation,	)	
	)	
Defendant.	)	

This cause, coming on to be heard, was submitted upon plaintiff's motion to remand. Brought under the provisions of the Fair Labor Standards Act, 29 U.S.C.A., Section 201, et seq., this action was improvidently removed to this court. Wilkins v. Renault Southwest, Inc., N.D., Texas, 227 F. Supp. 647 (1964), and cases therein discussed and cited.

It is, accordingly, ORDERED, ADJUDGED, and DECREED by the court that this action be and the same is hereby remanded to the Jefferson County Civil Court, from which it was removed.

Done, this the 9th day of June, 1964.

/s/ Seybourn H. Lynne
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

GOLDKIST, INC., Petitioner	)	
vs.	)	CV 80-M-1133
KAREN C. BLACK, Defendant.	)	

ORDER

This cause came before the court on plaintiff's motion to remand this action to state court. Plaintiff seeks unpaid, overtime compensation from defendant employer under the Fair Labor Standards Act. Jurisdiction in the state court is based on 29 U.S.C. §216(b) which provides that plaintiff's action "may be maintained . . . in any Federal or State court of competent jurisdiction...." Plaintiff contends that the remand of this action to state court is proper because section 216(b) is an express provision by Congress authorizing plaintiff's suit, not only to be brought, but to be "maintained" in

state court. The court is persuaded by plaintiff's argument and by the precedent of Judge Lynne in Price v. Asplundth Tree Expert Co., C.A. No. 64-284-S (N. D. Ala. 1964), remanding to state court a case arising out of the Fair Labor Standards Act.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff's motion to remand this action to state court be, and the same hereby is, granted.

Done this 16th day of December, 1980.

/s/ Frank H. McFadden
Chief Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7320

IN RE:

RECORD DATA, INC., a corporation,

Petitioner.

On Petition for Writ of Mandamus and/or Prohibition from the Northern District of Alabama

---

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and other relief is taken under advisement. Petitioner, Record Data, Inc., is directed to file a brief in this court on or before June 13, 1983. Plaintiff Jack F. Neal, is directed to file a response on behalf of District Judge, together with a brief on or before June 20, 1983. Until

further order of this court the parties are enjoined from proceeding in the state court.

ORDER OF THE UNITED
STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7320

IN RE:

RECORD DATA, INC., a corporation,

Petitioner.

On Petition for Writ of Mandamus and/or Prohibition from the Northern District of Alabama

---

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

BY THE COURT:

Concluding that the Court of Appeals has no jurisdiction to review the remand by mandamus or otherwise, the petition for mandamus and/or prohibition is denied. See 28 U.S.C. §1447(d).

The injunction, heretofore granted, from proceeding in state court is dissolved.

Office-Supreme Court, U.S.
FILED
DEC 22 1983
ALEXANDER L. STEVAS,
CLERK

Number: 83-513

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

RECORD DATA INC., a corporation, PETITIONER
vs.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (JACK F. NEAL, et als, REAL PARTIES IN INTEREST), RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

DENNIS E. O'DELL,
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(205) 536-9626

Counsel of Record for
Respondent

Number: 83-513

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

RECORD DATA INC., a corporation, PETITIONER
vs.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (JACK F. NEAL, et als, REAL PARTIES IN INTEREST), RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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Counsel of Record for
Respondent

QUESTIONS PRESENTED FOR REVIEW

The questions presented to the Court for review are:

Ultimate Question

1. Whether the United States Court of Appeals for the Eleventh Circuit erred in refusing to review the remand order of the United States District Court for the Northern District of Alabama, Northeastern Division, wherein the District Court Judge expressly found that the action was removed to the Federal District Court "improvidently and without jurisdiction"?

Subsidiary Questions

2. Whether the United States District Court for the Northern District of Alabama properly remanded the herein action under the Fair Labor Standards Act of 1938 as amended, 29 U.S.C., § 201, et seq. to the State Court where originally filed.

3. Whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the Fair Labor Standards Act of 1938 as amended, 29 U.S.C., § 201-219?

TABLE OF CONTENTS AND AUTHORITIES

A. Table of Contents

	Page
1. Questions presented for review	i
2. Table of Contents and Authorities	iii
A. Table of Contents . . .	iii
B. Table of Authorities . .	iii
3. Summary of the Argument . .	viii
4. Argument	1
5. Conclusion	29
6. Appendix	A-1

B. Table of Authorities

Cases	Page
Baldwin v. Sears, Roebuck & Co., 667 F.2d 458 (5th Cir. 1982).	27
Garner v. Mengel Co., 50 F.Supp. 794 (N.C. Ky. 1943).	26
Goldkist, Inc. v. Black, CV 80-M-1133-W (N.D. Ala. 1980). (unpublished order).	18

	Page
Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, 52 L.Ed. 2d, 1 97 S.Ct. 1439 (1977).	3, 6, 7, 8 9, 10, ix
Hill v. Moss-America, Inc., 309 F. Supp. 1175 (N.D. Miss. 1970).	18, 24, 28
In re Merrimack Mutual Fire Insurance Co. 587 F.2d 642 (5th Cir. 1978).	8, 9, 10, 12, 13 ix
In re Weaver, 610 F. 2d 335 (5th Cir. 1980)	12
Johnson v. Butler Bros., 162 F. 2d 87 (8th Cir. 1947)	27
Live and Let Live, Inc. v. Carlsbeg Mobile Home Properties, 592 F. 2d 846 (5th Cir. 1979)	11
London v. United States Fire Ins. Co., 531 F. 2d 257 (5th Cir. 1979)	11
Price v. Asplundth Tree Expert Co., A. No. 64-284-S (N.D. Ala. 1964) (unpublished order).	18
Rossi v. Singer Sewing Machines Co., 127 F. Supp 53 (D. Conn. 1954).	25

	Page
Royal v. State Farm Fire and Casualty Co. 685 F. 2d 124 (5th Cir. 1982)	1, 3
Self v. Self, 614 F. 2d 1026 (5th Cir. 1980)	12
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 46 L.Ed. 2d, 542, 96 S.Ct. 584 (1976).	2, 3, 4, 5, 6, 7, 8, 10 11, 12, 13, 14 viii
Volvo of America Corporation v. Schwarzer, 429 U.S. 1331, 46 L.Ed 2d 273, 97 S. Ct. 285 (1976).	3, 5 6
Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N..D. Tex. 1964).	18, 25

Page

Statutory Provisions

28 U.S.C. § 1332	5
28 U.S.C. § 1441 et seq.	x
28 U.S.C. § 1441(a)	ix, 17, 22, 25
28 U.S.C. § 1443	11
28 U.S.C. § 1445	23
28 U.S.C. § 1447(c)	viii, ix, x, 1, 2, 4, 5, 6, 7, 9, 13 20
28 U.S.C. § 1447(d)	x 1, 2, 3, 4, 6, 7, 13
29 U.S.C. § 201 et seq.	16, 17, 21
29 U.S.C. 216	18, 21, 24, 28
29 U.S.C. 621	27

	Page
29 U.S.C. 626(c)	28

Textbooks and Other Authorities

American Law Institute "Study of the Division of Jurisdiction Between State and Federal Courts" (1969)	24
Senate Report Number 1830, 85th Congress 2d Session, 1958	23
172 American Law Reports, Annotated 1157	27
10 American Law Reports, Annotated 919	20

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Eleventh Circuit was prohibited from reviewing the remand order of a district court and, therefore, the petition for writ of certiorari is due to be denied. The grounds upon which the District Court relied in entering its order remanding this action to the State Court are clear and unambiguous and fall strictly and expressly within the provisions of 28 U.S.C. § 1447(c). The District Court expressly based it order to remand to the State Court upon the grounds that the action was removed "improvidently and without jurisdiction". The Court of Appeals was not authorized to make an inquiry into the merits of the decision of the District Court remanding the action to State Court. It is clear that the instant action differs both procedurally and factually from the Thermtron decision upon

which the Petitioner relies in alleging error in the Court of Appeals refusal to review the remand order of the District Court. To entertain the mandamus requested by the Petitioner, the Eleventh Circuit Court of Appeals would have had to act in direct conflict with binding authority of the Supreme Court's decision in Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, and also in direct conflict with the Merrimack case decided by the United States Court of Appeals for the Fifth Circuit and representing binding authority on the Eleventh Circuit.

The District Court properly invoked the grounds established in 28 U.S.C. §1447(c) in that it expressly found that in its district, the "may be maintained" language of the FLSA constitutes an expressed provision against removal within the meaning of 28 U.S.C. § 1441(a).

Succinctly stated, the Respondent's position is that the petition for writ of certiorari is due to be denied because the Court of Appeals was prohibited from reviewing the remand order of the District Court by virtue of 28 U.S.C. § 1447(d) and the binding authority of the decisions of United States Supreme Court and the United States Court of Appeals for the Fifth Circuit. The remand order of the District Court even if erroneous in its analysis, cannot be reviewed by appeal, mandamus or otherwise, by virtue of the invocation of the statutory language of 28 U.S.C. §1447(c). Respondent further submits that the District Court acted within its proper authority in remanding the action to State Court because established precedence of the United States District Court for the Northern District of Alabama is that an action brought under the Fair Labor Standards Act of 1938, as amended is not removable pursuant to 28 U.S.C. § 1441, et seq.

ARGUMENT

1. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT WAS BARRED FROM REVIEWING THE ORDER OF A DISTRICT COURT REMANDING THE ACTION TO STATE COURT BECAUSE THE DISTRICT COURT JUDGE EXPRESSLY FOUND THE ACTION WAS REMOVED FROM THE STATE COURT "IMPROVIDENTLY AND WITHOUT JURISDICTION".

The bar against reviewing a remand order is found in § 1447(d) of Title 28, U.S.C., and the grounds upon which a case may be remanded from Federal Court to State Court is contained in § 1447(c). Because the Petitioner sought to review by mandamus an order of the District Court remanding the action to State Court, the Court of Appeals was presented with a threshold question of jurisdiction. Royal v. State Farm and Casualty, 685 F. 2d 124 and 125. For authority to review the remand order, the

Petitioner has heavily relied upon the case of Thermtrom Products, Inc. v. Hermansdorfer, 423 U.S. 336. In that decision, this Court reversed the Sixth Circuit Court of Appeals which had held a remand order was absolutely non-reviewable. The United States Supreme Court authorized review of the District Court's remand order where said order rested solely upon the ground that the District Court's docket was overcrowded. Prior to the rendition by this Court of the Thermtron, supra, § 1447(d) of Title 28, U.S.C., operated as an absolute bar to review of remand orders by any method. In Thermtron, supra, the Supreme Court through Mr. Justice White, provided for an inquiry by the appellate court into the question of whether or not a remand order was issued for reasons not authorized by § 1447(c). However, a close reading of the Thermtron case and cases

following it clearly shows that the well-established general rule prohibiting review of remand orders set out by § 1447(d) remains intact. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723, Volvo of America Corporation v. Schwarzer, 429 U.S., 1331, Royal v. State Farm Fire and Casualty Company, 685 F.2d 124 (5th Cir. 1982).

The express language of the District Court in remanding the case to State Court was the "action was removed improvidently and without jurisdiction. . ." (Appendix at 2). The Petitioner would have the Thermtron doctrine extended to allow a Court of Appeals to review the analysis upon which a District Court has based its expressed findings that an action was removed from State Court improvidently and without jurisdiction. The Respondent submits that the

Thermtron doctrine has not and should not be given the broad application suggested by the Petitioner. The Respondent concedes that prior to Thermtron decision, the prohibition against review of remand orders was absolute and, thereafter only a limited inquiry was authorized by that case.

The Thermtron court stated:

> "It is unquestioned in this case and conceded by Petitioners that this section [§ 1447(d)] prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447(d) and its predecessor stretching back to 1887. (Citations omitted). If a trial judge purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction' his order is not subject to challenge in the Court of Appeals by appeal, by mandamus, or otherwise." Thermtron, supra at 343.

Contrary to what is submitted by the Petitioner, the inquiry "licensed" by Thermtron is not whether a remand is based

upon the 1447(c) grounds (improvidently and without jurisdiction), but the inquiry is whether the remand order purports to be upon the proper grounds. Thermtron, supra.

In Volvo of America Corporation v. Schwarzer, 429 U.S. 1331, Mr. Justice Rehnquist, sitting as Circuit Justice, denied an application to stay an order of the United States District Court for the Northern District of California remanding a case to state court, where it was alleged that the district court erroneously applied the law in determining a lack of diversity under 28 U.S.C. § 1332. Justice Rehnquist stated that even if the district court was wrong in its analysis, it clearly stated that it considered itself without jurisdiction and cited the specific language of 28 U.S.C. 1447(c) ("removed improvidently and without jurisdiction"). Justice Rehnquist went on to say "review of this order,

therefore, is presumptively barred by the operation of 28 U.S.C. § 1447(d). . . ".

It was further held that

> "Thermtron is of no help to applicant as the remand was explicitly based on an allegedly erroneous finding that the court 'does not have jurisdiction of this action'". (citations omitted). Volvo of America Corporation v. Schwarzer, supra at 333.

In 1977, this Court again spoke on the issue of non-reviewability of a motion to remand granted under § 1447(c). Gravitt v. Southwestern Bell Telephone Company, 430 U.S. 723. The United States Court of Appeals for the Fifth Circuit by mandamus ordered a Texas District Court to vacate its remand order because the latter had employed erroneous principals in concluding that it was without jurisdiction as a result of incomplete diversity. In reversing the Fifth Circuit, the Gravitt court held that when a district court determines that the action was removed,

"improvidently and without jurisdiction. . . and when a remand has been ordered on these grounds, 28 U.S.C. § 1447(d) unmistakably commands that the order 'remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise. . .'". Gravitt, supra at 723.

The Court went on to say:

"Thermtron did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." Gravitt, supra at 724.

The instant action came before the United States Court of Appeals for the Eleventh Circuit in the exact posture as the Gravitt case came to the Fifth Circuit Court of Appeals. While the Gravitt case involved questions of incomplete diversity and the instant action involves removability of an action under the Fair Labor Standards Act, each respective Court of Appeals was presented with the question of whether or not it could review the analysis upon which a District Court had based its express

finding that an action had been removed to Federal Court improvidently and without jurisdiction. The Supreme Court of the United States reversed the United States Court of Appeals for the Fifth Circuit in the Gravitt case for reviewing the alleged erroneous principals employed by the District Court in remanding the action. Clearly, had the Court of Appeals for the Eleventh Circuit entertained the requested mandamus of the Petitioner, it would have acted in direct conflict with the binding authority of this Court's holding in Gravitt.

It is clear from subsequent decisions that the majority opinion in Thermtron provides little guidance concerning the removability of an action. In Re Merrimack Mutual Fire Insurance Company, 587 F.2d 642 (5th Cir., 1978).

This Court has clearly indicated that no rule was created which allows review of a remand order even though a Court of Appeals determines that error has occurred in reaching the 1447(c) grounds.

Following the Gravitt decision, the United States Court of Appeals for the Fifth Circuit decided In Re Merrimack Mutual Fire Insurance Company, 587 F.2d 642 (5th Cir., 1978). In refusing to issue mandamus, the Court of Appeals in Merrimack found that the Thermtron decision presented

> "only a narrow rule that was intended to be limited to the extreme facts of that case, in which a district judge stated openly that he was relying on a non-1447(c) ground for remand. The Thermtron court never stated that it was willing to construe the seemingly absolute bar of § 1447[(c)] (sic) as extending beyond the exceptional facts of that case. . ." In Re Merrimack Mutual Fire Insurance Company, supra, at 647.

The Merrimack decision makes it clear that the mere invocation of § 1447(c) by the

District Court "will preclude review of a remand order no matter how clearly erroneously the order appears on its face." In Re Merrimack Mutual Fire Insurance Company, supra, at 648.

The Court went on to say:

> "After Gravitt, it appears that Thermtron was intended to be strictly limited to those cases in which a District Judge has actually stated that he is not relying on § 1447(c) in ordering a remand." In Re Merrimack Mutual Fire Insurance Company, supra, at 648.

In order for the United States Court of Appeals for the Eleventh Circuit to grant the mandamus sought by the Petitioner, it would have had to rule in a manner directly in conflict with binding authority from the Fifth Circuit Court of Appeals as established by the Merrimack decision.

Because Judge Haltom has expressly found that the action was removed "improvidently and without jurisdiction"

(Appendix at 2), the Court of Appeals for the Eleventh Circuit could not consider whether the District Court was correct in its view of lack of jurisdiction. This is true regardless of the type of litigation before the Court (except § 1443 Civil Rights cases). Live and Let Live v. Carlsberg Mobile Home Properties, Limited, 592 F.2d 846 (5th Cir., 1979).

It is also true that unless the issue of reviewability of the remand order of the District Court was answered in a manner favorable to the Petitioner, any further consideration of any other issue put forth by the Petitioner would be improper and unwarranted. London v. United States Fire Insurance Company, 531 F.2d 257 (5th Cir., 1976). The London v. United States Fire Insurance Company case constitutes another reaffirmation that the Thermtron case is only applicable to certain extreme situa-

tions which are not present in the case before this court.

The Respondent submits that the District Court was clear and unambiguous for stating the reasons for its remand order. Even if it was not clear and unambiguous, however, the ruling in the Merrimack case holds that the appellate court may not use a writ of mandamus to compel the District Court to state its reasons for remanding in clearer terms. In Re Merrimack Mutual Fire Insurance Company, supra. The Merrimack decision was further followed and supported in the case of In Re Weaver, 16 F.2d 335 (5th Cir., 1980). See also Self v. Self, 614 F.2d 1026 (5th Cir., 1980).

It is clear that the case before this Court is quite a different case both procedurally and factually from the limited circumstances found in the Thermtron decision. Therefore, the refusal of the

Court of Appeals to issue the writ of mandamus was proper. No inquiry is authorized by statutory or case law into the merits of the decision of the District Court remanding this action to the state court. The grounds upon which the District Court relied in entering its remand order are clear and unambiguous and fall strictly and expressly within the provisions of 28 U.S.C. § 1447(c).

In the Merrimack decision, we find the following:

> "The purpose of the 1447(d) bar on appellate review of remand orders is to avoid delay in reaching the merits in a case because of 'protracted litigation' over whether the case is in the proper court." (Citing Thermtron Products, supra). Merrimack, supra, at 648.

The dissenting opinion in the Thermtron case, through Mr. Justice Rehnquist, outlined the accepted congressional purpose in barring review of all remand orders. The

Justice stated that the bar is to prevent additional delays which result when a removing party seeks appellate reconsideration of a remand order.

> "The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted, the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.
>
> It is clear that the ability to invoke appellate review, even if ultimately unavailing on the merits, provides a significant opportunity for additional delay. Congress decided that this possibility was an unacceptable source of additional delay and therefore, made the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court." Thermtron, supra at 354, 355 (Dissenting opinion).

The Respondent in the case at bar has experienced substantial delay in prosecuting its claim to final judgment as a result of the procedural availability of the removal statutes to the Petitioner. The action was begun in state court on April 15, 1982. Petitioner availed itself of a petition for removal to the District Court. Thereafter, the District Court's decision to remand the action to the state court was not entered until April 13, 1983, whereupon (Appendix at 2) whereupon the Petitioner sought reconsideration from the District Court. Upon the denial of the request for reconsideration by the District Court, the Petitioner then sought the extraordinary writ from the Eleventh Circuit Court of Appeals without success, and now seeks the writ of certiorari which presents the case at bar before this Court, all of which has resulted in lengthy delays, tremendous inconvenience,

expense and attorney's fees to the Respondent.

2. THIS ACTION UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, 29 U.S.C. §§ 201 ET SEQ., WAS PROPERLY REMANDED TO THE STATE COURT BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

The order to remand this action to the state court contains express language as follows:

> "It appearing to the court that this action was removed improvidently and without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith, is it
>
> ORDERED, ADJUDGED and DECREED that this cause be and the same hereby is REMANDED to the Circuit Court of Madison County, Alabama, from whence it was removed." (Appendix at 2)

In Judge Haltom's memorandum of decision, the following narrowing of the issue is found:

> ". . . the narrow question left for the court to determine is whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (FLSA)." (Appendix at 4 and 6).

The District Court went on in its memorandum to recognize a continuing split in authority over the question of whether or not FLSA cases are removable. The memorandum goes on to explain that the split of authority hinges upon the language in FLSA permitting actions to be "maintained" in either federal or state court with the cases against removal treating the "maintained language of the FLSA as an express provision against removal within the meaning of 28 U.S.C. §1441(a). Judge Haltom then cites as precedence for the United States District for the Northern District of Alabama two unpublished orders involving remands to state court of FLSA cases. (Appendix at 11

and 12). Of particular import, the order of Judge McFadden in the Goldkist,Inc. case refers specifically to the "may be maintained" language of 29 U.S.C. § 216(b) which language the court adopts as an express provision against removal within the meaning of 28 U.S.C. § 1441(a).

Judge Lynn in the Price v. Asplundth Tree Expert Company case cites as authority for the District Court Wilkins v. Renault Southwest, Inc., 227 F.Supp. 647 (N.D. Tex. 1964) "and cases therein discussed and cited". (Appendix at 11).

The Petitioner in its petition to this Court cites with approval Hill v. Moss-American, Inc., 309 F.Supp. 1175 (N.D. Miss. 1970), which case admittedly allowed removal to stand in a FLSA suit. However, of greater significance is the language from Hill v. Moss- American, Inc., supra, quoted in the petition before this Court as follows:

> "Recognizing that the federal removal statute has been amended in 1948 and that since numerous federal courts were split on the issue before it and 'the choice for [it] is to follow [its] own rule, which is not yet settled by precedent within the district . . .'". (Petition for writ of Certiorari of Record Data at page 51, emphasis added)

Clearly, because of the continuing split on the issue of removal of FLSA cases, the United States District Court for the Northern District of Alabama has the right to choose to follow its own rule to allow or deny removal in FLSA cases as it deems appropriate. Petitioner itself verified this to be the case as is shown by the quoted material above.

It is clear then that the United States District Court for the Northern District of Alabama has made its own choice and that choice is to deny the removal to district court of a FLSA suit. The order remanding this action to the state court was a proper

decision according to the precedence established in the Northern District of Alabama. (Appendix at 11 and 12). Surely, in those courts which have adopted the view that the "may be maintained" language of the FLSA is an express provision by an Act of Congress forbidding removal of FLSA cases, remand orders are a proper exercise of authority as actions having been removed "improvidently and without jurisdiction" according to 28 U.S.C. § 1447(c). Hence, an examination of the merits of the decision by the District Court to remand this action to the State Court reveals that said order to remand was proper according to the view adopted by the United States District Court for the Northern District of Alabama concerning removability of FLSA cases.

3. <u>THERE IS AN EXPRESS PROVISION BY AN ACT OF CONGRESS FORBIDDING REMOVAL OF ACTIONS BROUGHT PURSUANT TO THE PROVISIONS</u>

OF THE FAIR LABOR STANDARDS ACT OF 1938, 29 U.S.C. §§ 201-219.

Respondent adopts the view outlined in the memorandum of decision of Judge Haltom entered contemporaneously with his remand order of April 13, 1983 (Appendix at 4), wherein Judge Haltom indicated that the District Court would have original jurisdiction over this action under 29 U.S.C. § 216(b) and that this District Court is the District Court of the United States for the jurisdiction over this action under 29 U.S.C. § 216(b) and that this District Court is the District Court of the United States for the District and Division embracing the place where such action was pending in State Court. Respondent concedes the original jurisdiction of the District Court in a FLSA case and Respondent further concedes that Petitioner completed all mechanical and procedural requirements of the removal statute,

28 U.S.C. § 1441, et seq. and further discussion of these issues is unnecessary. However, Respondent does not purport to concede that by complying with the mechanical and procedural requirements of the removal statute, the action was providently and properly removed to the court below. As set out in the memordandum of decision of the District Court (Appendix at 4), there continues to exist substantial conflict among the authorities on the issue of removal of FLSA cases. It cannot be questioned that the 1948 amendment to the removal statute has not resulted in a resolution of the split of authority. The United States District for the Northern Division of Alabama has adopted the views which denies removal in FLSA cases which is supported by precedence as cited in Judge Haltom's memorandum of decisicn. In support of this view, the Respondent would first direct this

court to Senate Report Number 1830, US Code Cong and Adm News 3106, 85th Congress 2d Session, which pertains to the 1958 amendment to 28 U.S.C. § 1445 wherein congressional intent concerning removal in FLSA cases can be drawn:

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similiar to the workman's compensation acts of the states. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers Liability Act, all of which are in the nature of workman's compensation cases, the Congress has given the workman the option of filing his case in either the state court or the federal court. If filed in the state courts, the law prohibits the removal to the federal court. This proposed legislation accomplishes this same purpose and works the same privilege to workman who are entitled to compensation under the State Workman's Compensation Act--that is, the workman has the option to file his case in either the Federal or State court. If he files in the state court, it is not removable to the federal court." (Senate Report Number 1830, supra).

Additionally the American Law Institute in its "Study of the Division of Jurisdiction Between State and Federal Courts" (1969) proposed that actions by an employee to recover wages under § 16 of the FLSA (29 U.S.C. § 216) shall not be removed from a state court to a federal district court. The Institute further observed that the "may be maintained" language of the FLSA prohibits removal of such suits to federal district court and that its proposed provision would resolve the continuing controversery that remains unsettled over this.

According to the Hill v. Moss-American, Inc. case, 309 F.Supp. 1175 (N.D. Miss. 1970) because of the continuing split on the issue of removability of FLSA cases, each district court may choose for itself the view it wishes to follow in these types of cases. The Hill court makes it clear that the United States District Court for the

Northern District of Mississippi has adopted the view in favor of removal. However, the United States District Court for the Northern District of Alabama has adopted the view which would deny removal of FLSA suits.

Since the view of the Northern District of Alabama is the one that accepts the "may be maintained" language of the FLSA as an express provision against removal within the meaning of 28 U.S.C. §1441(a), the Respondent shall address the definition of the term "maintained". The word "maintained" as used in the FLSA has been held to mean that an action could be prosecuted in the court of the choice of the plaintiff in the action to a conclusion without removal Rossi v. Singer Sewing Machine Company, 127 F.Supp. 53 (D.C. Conn. 1953), Wilkins v. Renault Southwest, Inc., 227 F.Supp. 647 (N.D. Tex. 1964).

The term "maintained" carries a different meaning from "institute" or "begin" and implies that an action must be begun before it could be maintained. The definition of maintained has been stated as "continuing or persevering in or with; carrying on as maintaining an attack, a correspondence or a legal action." It has been described as to uphold, continue on foot and keep from collapse a suit already begun and several cases have defined a distinction between beginning and maintaining an action. Garner v. Mengel Company, 50 F.Supp. 794 (D.C. Ky. 1943), citing authorities. Garner went on to say that where the question of remand was doubtful, the doubt should be resolved in favor of remanding the action to state court. Garner v. Mengel Company, supra; 10 ALR Fed. 919 at 931.

It cannot be doubted that to allow removal of FLSA cases would further congest the dockets of the federal district court, and the removing employer could effect delays, increase the cost of litigation, and harass the plaintiff-employee through the use of the removal statutes. It cannot be doubted that the state courts of competent jurisdiction are well equipped to render speedy andjust decisions in FLSA cases. Johnson v. Butler Brothers, 162 F.2d 87, 172 ALR 1157.

The Petitioner cites as instructive the case of Baldwin v. Sears, Roebuck & Co., 667 F.2d 458 (5th Cir. 1982) which involved the removability of suits under the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 621, et seq. However, the language in the ADEA is substantially different from the language of the FLSA and can therefore be readily distinguished. Congress provided in

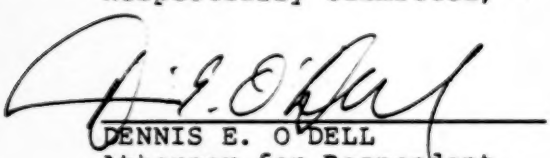
the ADEA the language "may bring a civil action in any court of competent jurisdiction", 29 U.S.C. § 626(c) as opposed to the language "may be maintained in any. . . court of competent jurisdiction. . . ", 29 U.S.C. § 216(b). Since "maintained" carries a different meaning from "institute" or "begin", cases involving the ADEA are not determinative in deciding matters concerning the FLSA.

The Respondent submits that the view which has been adopted by the United States District Court for the Northern District of Alabama which denies removal in FLSA cases is not contrary to the great weight of authority, but merely the adoption of the definition of the term "maintained", which the Hill v. Moss-American decision as cited in the brief of Record Data, establishes "is susceptible of two possible reasonable interpretations. . . ". Hill v. Moss-American, Inc., supra.

CONCLUSION

For the foregoing stated reasons, the Respondent respectfully submits that the petition of Record Data for writ of certiorari is due to be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Dennis E. O'Dell, counsel for the Respondent, Jack F. Neal, pursuant to Rules 28.2, 28.3 and 28.5, of the Rules of the United States Supreme Court, hereby certify that I have this day served three copies of the foregoing Brief for the Respondent upon

the following parties who are all the parties required to be served with the same: Frank K. Noojin, local counsel for Petitioner, Record Data, Inc., a corporation, 200 Terry Hutchens Building, P. O. Box 287, Huntsville, Alabama 35804, by mailing said copies to him by depositing the same in the United States Post Office with first class, priority, postage prepaid.

Done this 21st day of December, 1983.

DENNIS E. O'DELL
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Telephone: (205) 536-9626
(Admission date 1/9/84)

STATE OF ALABAMA

COUNTY OF MADISON

SWORN TO AND SUBSCRIBED before me on this the 21st day of December, 1983.

NOTARY PUBLIC
State of Alabama at Large

APPENDIX

ORDER OF THE UNITED STATES
DISTRICT COURT FOR
THE NORTHERN DIVISION OF
ALABAMA, NORTHEASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK F. NEAL Plaintiff -v- RECORD DATA, INC., a corporation, et al. Defendants	NO. CV 83-HM-5257-NE

O R D E R

It appearing to the court that this action was removed improvidently and without jurisdiction for the reasons stated in the Memorandum of Decision filed contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that this cause be and the same hereby is REMANDED to the Circuit Court of Madison County, Alabama, from whence it was removed.

The clerk of court is directed to send a certified copy of this order of remand to the clerk of such state court. Costs are taxed against the removing defendant.

DONE and ORDERED this 13th day of April, 1983.

/s/ E. B. Haltom, Jr.
E. B. HALTOM, JR.,
United States District Judge

MEMORANDUM OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, NORTHEASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JACK F. NEAL, Plaintiff,	)
vs.	) NO.CV82-HM-5257-NE
RECORD DATA, INC., a corporation, et al. Defendants.	)

MEMORANDUM OF DECISION

This cause came on to be heard at the scheduled motion docket of this court upon motion of plaintiff to remand this cause to the Circuit Court of Madison County, Alabama. Plaintiff originally brought this action for overtime compensation under the Fair Labor Standards Act in the Circuit Court of Madison County, Alabama. Defendant timely petitioned this court for removal of the action to the Northern District of Alabama, Northeastern Division. In its petition defendant asserts that this court has original jurisdiction

over this action pursuant to the provisions of 28 U.S.C. §§1331 and 1332, and that this action is properly removed pursuant to the provisions of 28 U.S.C. §1441. Thereafter plaintiff filed a motion to remand this case to the Circuit Court of Madison County. In his motion plaintiff argues that this action may be maintained in any court of competent jurisdiction pursuant to 29 U.S.C.A. §216(b) and thus the action is not removable to federal district court under 28 U.S.C. §1441.

28 U.S.C. §1441(a) reads as follows:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Since it is clear that this court would have original jurisdiction over this action, see 29 U.S.C. §216(b), and that this court is admittedly the district court

of the United States for the district and division embracing the place where such action was pending, the narrow question left for the court to determine is whether there is an express provision by an Act of Congress forbidding removal of actions brought pursuant to the provisions of the Fair Labor Standards Act, 29 U.S.C. §§201-219 (FLSA).

The enforcement provisions of the FLSA are found in 29 U.S.C. §216, which provides in pertinent part as follows:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. §216(b).

There is substantial conflict among the authorities on the issue of removal of FLSA cases. See Bintrim v. Bruce-Merilees Electric Company, 520 F.Supp. 1026 (W.D. Pa. 1981); Griffin v. Hooper-Holmes Bureau,

Inc., 413 F..Supp. 107 (M. D. Fla. 1976); 1A J. Moore, Moore's Federal Practice ¶0.167[5] n.5 (2d ed. 1982) (impliedly criticizing those cases not allowing removal); 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3729 (1976). Disagreement centers around the interpretation of the language in 29 U.S.C. §216(b) providing that an action may be "maintained" against an employer in any Federal or State court of competent jurisdiction. One line of authority holds that by using the word "maintained" Congress intended not only that the action might be commenced in any court of competent jurisdiction, but that it could be continued until final judgment in the court in which it was commenced. Johnson v. Butler, 162 F. 2d 87 (8th Cir. 1947); Bintrim, 520 F. Supp. at 1027; Wilkins v. Renault Southwest, Inc., 227 F. Supp. 647 (N.D. Tex. 1964). These courts have therefore viewed this language as an express provision against removal within the meaning of 28 U.S.C. §1441(a).

On the other hand, other courts have allowed removal of FLSA cases, arguing that the language in the FLSA permitting actions to be "maintained" in either Federal or State court (1) implies only that actions may be commenced in either court, and does not grant a right to prosecute the case to conclusion in the chosen forum, and (2) does not constitute an express provision prohibiting removal, as is required by the general removal statute, 28 U.S.C. §1441(a). 14 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure §3729 (1976). See, Hill v. Moss-American, Inc., 309 F. Supp. 1175 (N. D. Miss. 1970).

Defendant has filed a scholarly brief in which it persuasively argues that the better view favors removability of FLSA cases. However, in Price v. Asplundth Tree Expert Company, CA No. 64-284-S (N.D. Ala. 1964) (unpublished order--copy attached) Judge Seybourn H. Lynne held that an action under the FLSA was due to be remanded as

improvidently removed. This holding was later followed by then Chief Judge Frank H. McFadden in Goldkist, Inc. v. Black, CV 80-M-1133-W (N.D. Ala. 1980) (unpublished order--copy attached). Conceding that there is meritorious argument to be made for removal of FLSA cases, this member of the court declines to depart from the precedent of the United States District Court for the Northern District of Alabama enumerated above until such time as a definitive ruling is made either by the United States Court of Appeals for the Eleventh Circuit or by the Supreme Court of the United States. Consequently, the court holds that, this action having been commenced in the state circuit court, it was improvidently removed to this court and must be remanded. In so holding, the court concurs with the decisions of Price and Goldkist, supra.

An appropriate order remanding this action to the Circuit Court of Madison County, Alabama will be entered.

/s/ E. B. Haltom, Jr.
E. B. HALTOM, JR.,
United States District
Judge

April 13, 1983

BOBBY JOE PRICE,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
vs.	)	No. 64-284
	)	
ASPLUNDTH TREE EXPERT COMPANY, a corporation,	)	
	)	
Defendant.	)	

This cause, coming on to be heard, was submitted upon plaintiff's motion to remand. Brought under the provisions of the Fair Labor Standards Act, 29 U.S.C.A., Section 201, et seq., this action was improvidently removed to this court. Wilkins v. Renault Southwest, Inc., N.D., Texas, 227 F. Supp. 647 (1964), and cases therein discussed and cited.

It is, accordingly, ORDERED, ADJUDGED, and DECREED by the court that this action be and the same is hereby remanded to the Jefferson County Civil Court, from which it was removed.

Done, this the 9th day of June, 1964.

/s/ Seybourn H. Lynne
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

GOLDKIST, INC.,	)	
	)	
Petitioner	)	
	)	
vs.	)	CV 80-M-1133
	)	
KAREN C. BLACK,	)	
	)	
Defendant.	)	

ORDER

This cause came before the court on plaintiff's motion to remand this action to state court. Plaintiff seeks unpaid, overtime compensation from defendant employer under the Fair Labor Standards Act. Jurisdiction in the state court is based on 29 U.S.C. §216(b) which provides that plaintiff's action "may be maintained . . . in any Federal or State court of competent jurisdiction...." Plaintiff contends that the remand of this action to state court is proper because section 216(b) is an express provision by Congress authorizing plaintiff's suit, not only to be brought, but to be "maintained" in

state court. The court is persuaded by plaintiff's argument and by the precedent of Judge Lynne in Price v. Asplundth Tree Expert Co., C.A. No. 64-284-S (N. D. Ala. 1964), remanding to state court a case arising out of the Fair Labor Standards Act.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff's motion to remand this action to state court be, and the same hereby is, granted.

Done this 16th day of December, 1980.

/s/ Frank H. McFadden
Chief Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7320

IN RE:

RECORD DATA, INC., a corporation,

Petitioner.

On Petition for Writ of Mandamus and/or Prohibition from the Northern District of Alabama

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Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and other relief is taken under advisement. Petitioner, Record Data, Inc., is directed to file a brief in this court on or before June 13, 1983. Plaintiff Jack F. Neal, is directed to file a response on behalf of District Judge, together with a brief on or before June 20, 1983. Until

further order of this court the parties are enjoined from proceeding in the state court.

ORDER OF THE UNITED
STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 83-7320

IN RE:

RECORD DATA, INC., a corporation,

Petitioner.

On Petition for Writ of Mandamus and/or Prohibition from the Northern District of Alabama

---

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

BY THE COURT:

Concluding that the Court of Appeals has no jurisdiction to review the remand by mandamus or otherwise, the petition for mandamus and/or prohibition is denied. See 28 U.S.C. §1447(d).

The injunction, heretofore granted, from proceeding in state court is dissolved.